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JAMES H. MCKENNEY

—IN THE—

Supreme Court of the United States

No. 1,111.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank, } *Appellant,*

versus

AMERICAN EXCHANGE NATIONAL BANK OF CHICAGO, } *Appellee.*

BRIEF FOR THE APPELLANT.

JOHN W. HERRON,
Solicitor.

The Ohio Valley Print, 143 Race Street, Cincinnati.

—IN THE—

Supreme Court of the United States.

DAVID ARMSTRONG, RECEIVER OF THE FIDELITY NATIONAL BANK, } *Appellant,*

VERSUS

AMERICAN EXCHANGE NATIONAL BANK OF CHICAGO, } *Appellee.*

BRIEF FOR APPELLANT.

The action below was brought to compel the appellant to allow, as a valid claim against the trust represented by him, the sum of $200,000. This claim was founded on the following paper writing:

"U. S. DEPOSITORY — THE FIDELITY NATIONAL BANK,
CINCINNATI, June 14, 1887.

The American Exchange National Bank, Chicago, Ill.:

GENTLEMEN,—Messrs. Wilshire, Eckert & Co. have deposited two hundred thousand dollars ($200,000) to your credit for C. J. Kershaw & Co.

Respectfully yours,

BENJ. E. HOPKINS,
As. Cas."

This paper was obtained by the appellee in the following manner:

The Fidelity National Bank of Cincinnati, Ohio, was organized under the National Banking Act with a capital of $1,000,000.

E. L. Harper was vice-president and the actual manager of the bank; Benj. E. Hopkins was the assistant cashier.

Harper entered into a large speculation in wheat in Chicago, employing as brokers Wilshire, Eckert & Co., of Cincinnati. They employed C. J. Kershaw & Co. as their Chicago correspondents. Harper remitted to Chicago large sums of money to be used in this speculation, and in so doing appropriated to his own use the funds of the Fidelity Bank. These remittances were mainly made to the appellee for the account of C. J. Kershaw & Co.

On the 14th of June, 1887, this speculation had reached a critical point, and more money was demanded to sustain it. On that day the Fidelity telegraphed to the appellee as follows:

> "Joseph Wilshire will be at your bank to-morrow morning with six hundred thousand dollars, to make his trade with Kershaw and others good if they are protected until he arrives."

The appellee answered:

> "If Wilshire is here to-morrow morning with six hundred thousand currency, the deal will be safe. Answer quick."

The Fidelity replied:

> "Wilshire will be there on the morning train."

Wilshire did go to Chicago that night, taking with him the paper sued on in this case, and other paper purporting to represent in all $600,000, and in the morning at the bank gave part of it, including that now sued on, either to Kershaw or the cashier of the bank. The bank entered the amount received to the credit of Kershaw & Co.

No money was in fact deposited in the Fidelity Bank by Wilshire, Eckert & Co., or by any other person, as a consideration for this paper. The bank never received one dollar on account of it.

The answer denies that the defendant in error paid Kershaw & Co. all or any part of the amount mentioned in the letter of advice, as alleged in the bill. It avers that Harper, Hopkins, and Wilshire were engaged in a wheat deal in Chicago, and in attempting to corner the market there; that they conspired together to embezzle the funds of the Fidelity Bank; that the said letter of advice was delivered in execution of that conspiracy; that no money was deposited for the same; and charges the officers of appellee with notice of these facts.

The questions in the case are:

1. Whether the receiver of the Fidelity Bank is liable to a judgment to allow this as a valid claim against the trust fund.

2. If the appellee is a *bona fide* owner of the paper sued on and entitled to a judgment upon it, in what amount under the testimony should such judgment be rendered.

I.

Let us first consider the question whether the Fidelity Bank is legally liable on this paper.

It is strictly governed by the law of Ohio. It is dated, executed, and payable in Ohio.

Section 3171 of the Revised Statutes of Ohio provides what instruments are negotiable, and in what manner such instruments may be negotiated as follows:

"All bonds, notes, bills of exchange, foreign and inland, and checks for a sum certain and payable *to any person or order*, or *to any person or assigns*, shall be negotiable by *indorsement* thereon, and all such instruments, payable to a person or bearer, shall be negotiable by delivery, so as absolutely to transfer and vest the property thereof in each and every indorsee or holder successively."

A *bona fide* holder by indorsement of paper such as is described in this section is protected against defenses which the maker might set up against the original payee; but no other paper than thus described is thus protected, nor such paper unless the holder obtains it by indorsement.

The paper in question is neither payable "to any person or order," or "to any person or assigns," or "to any person or bearer," and does not therefore come within the statute of Ohio above quoted.

It seems unnecessary to discuss the question as to the exact character of this paper. It is clearly not "negotiable paper" according to the statute of Ohio, and therefore a *bona fide* holder as such acquires no greater right than the person to whom it was given. It represents that Wilshire, Eckert & Co. have deposited $200,000 in the Fidelity Bank, to be credited to the appellee for the use of C. J. Kershaw & Co. The paper was given to Wilshire, and he handed it to the appellee without any indorsement.

The Supreme Court of Ohio, in *Kyle et al.* v. *Thompson's Adm'r et al.* (11 Ohio St. 621), held in the case of negotiable promissory notes given by the payee to a third party for a valuable consideration before maturity, but without indorsement, and who had no notice of any defense to the note, as follows:

"These notes were both drawn payable to Harris Thompson or order; they were legally transferable only by indorsement; neither of them were ever indorsed; and the holders of them stood in the shoes of the payee, and subject to all equities existing in favor of the maker against the payee."

And in *Tisen* v. *Hanford* (31 Ohio St. 194) Judge McIlvaine held that an averment that the plaintiff was the holder and owner of a negotiable promissory note was not sufficient, when a want of consideration was stated in the answer; that he must aver an indorsement of the note to him. He says:

"That the payee upon such proof could not have recovered on the note is beyond doubt; and the same must be said of the

plaintiff, unless his title was derived by indorsement of the payee before maturity. The provisions of the statute of February 25, 1820, making certain instruments negotiable, is that such an instrument shall be negotiable by indorsement thereon," etc.

And so in *Weber* v. *Orton*, 91 Mo. 677:

"A note negotiable in character, but transferred without indorsement, is open to all the equities of a non-negotiable instrument, or to such as it would have been subject to in the hands of the original payee."

The same question has been decided by this court in *The Trust Company* v. *National Bank* (101 U. S. 68). The sylabus is:

"1. The defenses of the maker of a promissory note can be cut off only by the payee's indorsement of it before maturity.
"2. A guaranty written upon it by the payee is not such an indorsement."

In that case the Trust Company received the note before its maturity, and discounted it in the regular course of business (except in the form of the transfer), and without any knowledge of any equities or defense against it. But Justice Strong, on page 70 of that case, says:

"The note was not indorsed to the Trust Company, and it was not therefore taken in the usual course of business by that mode of transfer in which negotiable paper is usually transferred."

In the case now before the court Wilshire, Eckert & Co. had not deposited $200,000 or any other sum in the Fidelity Bank, and therefore, if they had brought suit on the paper, no recovery could have been had. They, however, it is claimed, transferred the paper to the appellee by delivery only. No protection is granted by the statutes of Ohio to such paper, or to the transfer of any paper in the mode adopted in this case, over and above that to which the original parties to it were entitled.

If the paper sued on is negotiable paper, then it would follow that the indorsement of it by the payee to a third party for

value would entitle the latter to collect it, although the defendant might have been paid the amount, and although the Fidelity Bank had paid without notice of such transfer. This is wholly at variance with the manner in which such a paper was treated by the parties, or indeed would be treated by any banking institution. No provision is inserted that the sum should not be paid over until the certificate is returned.

It is the deposit of the money that establishes the right to its repayment, and not the evidence of such deposit. If the deposit is entered in a deposit-book, or not entered in any book, the depositor has a right to sue for the return of the money if refused; and in Ohio he can transfer that right so that such assignee may sue for it; but clearly such right to recover back the money is in no sense a negotiable liability, like commercial paper.

If such an instrument had been prepared and executed on the expectation that the money would be deposited, and either stolen or the possession of it fraudulently obtained, no transfer of that instrument, no matter what the consideration paid for it, would entitle the holder to demand recovery of the money upon it, simply because the bank had executed it.

It certainly would present no stronger equity than that of a promissory note not payable to "order" or "assigns" or "bearer," and sold for its full value before maturity, and to one wholly ignorant of any defense to it.

In such a case the holder would acquire no better rights than the original payee had. So, in the present case, the appellee, as the mere holder of the bill of advice, can not enforce the same any better than Wilshire, Eckert & Co. could have done.

II.

As to the character of this paper, and the liability of the Fidelity Bank upon it, I quote further from the brief of E. W. Kittredge, Esq., filed in the Circuit Court in this case.

"In considering this question we submit that the burden of proof is upon the complainant to show the execution and delivery of this letter by the Fidelity Bank to the appellee. And, second, that it warranted the appellee not merely to draw for the amount mentioned in it upon the Fidelity Bank and to place it to the credit of Kershaw & Co. when it was received, but that it warranted it in *advancing* the money and giving *credit* for it to Kershaw & Co. for the sum mentioned in it. And, third, that it was not received by the appellee under such circumstances as would excite suspicion in a man of ordinary prudence and put him upon inquiry, especially when the means of information were at hand. And upon this point the doctrine of *mala fides*, as it is applied to commercial paper, has no application to the question.

"The counsel for the defendant, in their argument in the Circuit Court, so effectually repudiated the idea that upon the evidence in this case Wilshire could be regarded as the agent of the Fidelity Bank, for any purpose whatsoever, that it does not admit of further discussion. We fully agree with our learned adversaries that he was the broker of E. L. Harper; that Harper was his sole principal; that whatever instructions were given to him were given by Harper in his individual capacity. And it is also true, as the plaintiff in error pleads, and as we think the evidence leaves no doubt of, that Harper and Wilshire were in conspiracy together to embezzle the funds of the Fidelity Bank, to use them in the purchase of wheat, and that it was in pur-

suance of such conspiracy that this letter was written and placed in Wilshire's hands.

"In this view examine the question substantially as the counsel for appellee put it: Was Harper acting within his general authority as vice-president of the Fidelity Bank when he took and delivered this letter to Wilshire? If he was not, no doctrine of estoppel can rise upon paper of this character, as we have shown it to be, in favor even of innocent third parties. Clearly, Harper, as an individual, could not authorize Wilshire to make any representation to the appellee bank, to bind the Fidelity Bank, to the effect that Harper or Wilshire had deposited money with the Fidelity Bank. A delivery of this letter of advice by Wilshire as Harper's agent to the appellee could effect nothing as against the Fidelity Bank.

"Or if Wilshire fraudulently obtained the letter by collusion with Harper as the agent of the Fidelity Bank, his delivery to the appellee would be equally ineffective as against the Fidelity Bank.

"In *Coleman* v. *Riches* (29 Eng. L. & Eq. Rep. 323) the plaintiff was a dealer in grain, and the defendant kept a wharf. It was the custom for the vendors of the grain to deliver it at the wharf, and to take a receipt from the defendant's servant. For the purpose of getting money from the plaintiff by fraud, the defendant's servant gave to one of the farmers a false receipt—no grain, in fact, being delivered—and the plaintiff paid the price on the receipt being brought to him by the farmer. It was held that the plaintiff could not recover of the defendant for the money advanced upon this receipt.

"The cases involved the application of the same principle, that created much discussion and contrariety of decision in the state courts, in reference to bills of lading, which was finally established by the Supreme Court of the United States in the case of *Pollard* v. *Vinton* (105 U. S. 7).

"The difference between an estoppel upon such an instrument and that arising upon the transfer of negotiable paper under similar circumstances is brought out very distinctly by Judge Seldon, delivering the opinion of the court in the case of the *Farmers and Mechanics' Bank* v. *The Butchers' Bank* (16 N. Y. 125), which is the leading case in this country upon the effect of certifying a check by the officers of a bank. Quoting a remark from Justice Cresswell, in *Grant* v. *Norway* (10 Com. Bench, 564), a case upon a bill of lading, in answer to the citation of the case of *Hern* v. *Nichols* (1 Salk. 289), by plaintiff's counsel, as follows, upon page 141, the court say:

"'There the vendor entered into a contract with the plaintiff for his employment. Here you are a step further off. You say your agent with whom I made no contract has enabled a man with whom I did contract to cheat me.

"'This remark,' says Judge Seldon, 'presents, in my judgment, the turning point in the case, and the only obstacle to the plaintiff's recovery—viz., the want of any privity of contract between the plaintiff and the defendant. This obstacle was precisely that which the negotiability of the instrument, if established, would have removed, because the maker of a negotiable instrument is deemed in law to enter into a contract with every one to whom it is afterward negotiated. . . . Hence it is we find the counsel for the plaintiff in the case of *Grant* v. *Norway*, and the *Mechanics' Bank* v. *N. Y. & N. E. R. R. Co.* (13 N. Y. 399), contending so strenuously for the negotiability of the documents in question in these cases.'

"And in like manner, we may add, hence it is that we find the counsel for the appellee in the present case contending so strenuously that this letter of advice is a negotiable instrument.

"Suppose that the letter had been written and signed by Hopkins, and was lying in Harper's desk, in expectation that Wilshire would bring in the money and deposit it, and Wilshire had stolen it and gone to Chicago with it, and delivered it to the appellee bank; would the Fidelity Bank be liable upon it? There have been cases arising upon the liability of the parties

as makers of negotiable paper who acted so negligently as that it was stolen and put in circulation, like the case of *Baxendale* v. *Bennett* (3 Q. B. Div. 525). But we never have heard of its being claimed that an estoppel could arise by parties stealing a receipt which contained a representation that was not true in fact, and using it to defraud an innocent third party.

"If this letter is, as we have claimed, a mere acknowledgment, like a receipt, what is the case made with regard to it, and which the appellee's counsel affirm to have been made by the evidence? Why, that Hopkins, the assistant cashier, having signed this letter, Harper, the individual, with Wilshire, stole or embezzled it from the Fidelity Bank, and then Wilshire used it as a means to defraud the appellee. If Harper, as vice-president of the Fidelity Bank, delivered it to Wilshire, and did not, as vice-president of the bank, in any manner authorize Wilshire, as an agent of the bank, to deliver it to the appellee, Wilshire knew that this statement that he had deposited $200,000 was untrue; and if, under such circumstances, he used it to obtain money from the complainant, he was guilty of obtaining money under false pretenses.

"It was incumbent upon the appellee to ascertain that this letter was really the representation of the Fidelity Bank. The mere possession of it by Wilshire, unless that possession was honestly obtained, did not make it a representation of the Fidelity Bank to the appellee. If Wilshire came honestly by it, or if it was delivered to him by the bank with authority to deliver it to the Exchange Bank, then the appellee might safely take it. But as it was incumbent on the Exchange Bank, if he appeared with this letter, claiming that he was the agent of the Fidelity Bank, to ascertain the extent of his agency to deliver the letter, so if he appeared claiming to have come honestly by it—that is, that he had actually deposited the $200,000 mentioned in it with the Fidelity Bank, and that he had purchased a

credit in favor of the Exchange Bank, which he owned—it was his representation primarily upon which the Exchange Bank had to rely in accepting this letter from him. It was possible, as the event has shown, that Wilshire should be in the manual possession of this letter, either without its being given to him by the Fidelity Bank in the ordinary course of its business or without his being agent of the Fidelity Bank. That risk was one in reference to which the Exchange Bank was bound to satisfy itself before it acted upon the letter, or it assumed the risk attendant upon whatever action it might take.

"Did the terms of this letter warrant the Exchange Bank not merely to draw for the amount mentioned in it upon the Fidelity Bank, and to place it to the credit of Kershaw & Co. when it was received, but to advance the money, and give a present credit to Kershaw & Co. for the sum mentioned in it? It is said that it was the custom of the American Exchange Bank to so deal with Kershaw & Co. in respect to similar letters of advice addressed to it by the Fidelity Bank upon previous occasions. There is no evidence in the record that this habit, or custom, if it may be called such, of the American Exchange Bank was known to the Fidelity Bank. However definite the representation, it can not be enlarged by this evidence of the habit of the American Exchange Bank in dealing with its customers, Kershaw & Co., or by its being acted upon otherwise than according to its terms and clear meaning. These terms, if this letter had actually been delivered to the appellee by the authority of the Fidelity Bank, justified it in drawing for the money, and when received crediting it to Kershaw & Co.'s account, but not in advancing the money, or giving Kershaw & Co. the credit for it before it was received. The possession of the letter by Wilshire might have been obtained unlawfully, or the representation in it procured by fraud. If the Exchange Bank would advance money upon it, it must appear from the terms of the writing that this was what the Fidelity

to the date of this paper, in the prosecution of this attempt to corner the market. It had turned out to be an undertaking of great magnitude, involving the purchase, and contracts for the purchase, of over 30,000,000 bushels of wheat. In the prosecution of the enterprise a crisis was reached on the 14th day of June, 1888, requiring a large sum of money to enable Kershaw & Co. to carry the wheat they had, and to that end to sustain the market-price of wheat by purchases in Chicago. Harper and Hopkins to raise this money committed a felony by drawing paper to the amount of $600,000 in favor of Irwin, Green & Co. and of Kershaw & Co., in the name of the Fidelity Bank, which had no consideration for it, and nothing to do with this wheat deal, and delivering it to Wilshire to take to Chicago. Kershaw & Co. knew the character of this wheat deal, as the attempt to corner the market, for brevity, is called. The appellee bank knew of it and its character. The appellee bank had advanced a large sum of money to Kershaw & Co. upon a part of the wheat as collateral security, and in that way had aided in its prosecution, and was interested in the success of the undertaking. Both Kershaw & Co. and the appellee bank knew that this paper was brought up to Chicago by Wilshire from Cincinnati to aid in the prosecution of this undertaking, by enabling Kershaw & Co. and Irwin, Green & Co. to carry the wheat they already had, and to that end to sustain the market-price of wheat by purchases in Chicago. The paper thus made, and for this purpose solely, was produced by Wilshire, and given to Kershaw & Co. in presence of the appellee's cashier, and delivered to him with the understanding that, either upon the faith of it as collateral security or upon an absolute credit of it to Kershaw & Co., appellee bank would advance to Kershaw & Co. the amount of money then supposed to be necessary to sustain the deal—that is, to maintain the corner in the wheat market. So far we consider the facts to be indisputable.

"It is idle to talk of Kershaw & Co. having received this money in consideration of the indebtedness or part of the indebtedness to them incurred in this deal. No such consideration was expressed at the time. And there can be no dispute that this paper was sent by Harper and delivered by Wilshire for the sole purpose of 'saving the deal'—that is, enabling Kershaw & Co. and Irwin, Green & Co. to maintain the corner of the wheat market—in the manner indicated. It is upon these indisputable facts that we chiefly rely in affirming that the appellee acquired no title by reason of the illegality of the transaction. It is upon these facts that the telegram of the appellee bank, assuring the Fidelity Bank that if Wilshire was in Chicago with 'six zebras' the deal would be safe, is of great importance by the light it throws upon the position of the appellee in this transaction.

"The controverted facts, which, in connection with those that are indisputable, bear chiefly upon the question of the apellee's *mala fides* in acquiring this paper, and its want of ordinary prudence in advancing money to Kershaw & Co. upon the faith of it, relate the circumstances by which the appellee bank knew, or might have known, or at least have been put upon inquiry, as to Harper's relation to this deal; and the use by him of the name and credit of the Fidelity Bank in connection with it. It was well known to the officers of the appellee bank that Kershaw & Co. and Wilshire were acting in behalf of a Cincinnati principal or principals. Mr. Dewey, the vice-president of the appellee, was in Cincinnati as early as March, 1888, to ascertain who Hoyt's principals were. We have already adverted to the overstrained statement upon his testimony, rejecting what part of it is clearly incompetent, as stating only inferences or impressions of the witness, relating to his interview with Harper and Baldwin at that time. Mr. Dewey knew very well that whoever was Hoyt's principal, for reasons that were very obvious, if it was Harper, he withheld himself from view in the progress of the

deal. Mr. Dewey made no inquiries of Harper or Baldwin as to the principals for whom Kershaw & Co. and Wilshire were acting.

From March until June, for three months, the deal progressed through the appellee's bank by enormous remittances of money, in one form or another, through both Hoyt and Wilshire from the Fidelity Bank to both Kershaw & Co. and Irwin, Green & Co. The appellee bank had become aware that Hoyt and Wilshire were acting in concert for a common principal. It seems impossible to believe that the name of the Fidelity Bank could be used as the means of covering up the real principal behind Hoyt and Wilshire without exciting the suspicion of the appellee. But the name of Harper, as this unknown principal, was freely used in the Board of Trade and the public press in Chicago, and it could hardly be that it was not known to be so used by the officers of the Exchange Bank. The very testimony quoted by our opponents shows this.

"Mr. Hamilton Dewar, the brother of the appellee's cashier, and a partner in Kershaw & Co., a witness called by the appellee, testified (Rec. 288) as follows:

Q. Was Mr. Harper a gentleman who was very well known on the Board of Trade as a speculator in wheat in Chicago?
A. I never heard of him until about March, 1887.
Q. Where did you hear about him then?
A. I heard of him; he commenced to be talked about. *The papers commenced to talk: Harper was doing this, and Harper was doing that.*
Q. The papers in Chicago? He was doing what?
A. *He was buying all the wheat in Chicago—trying to buy all the wheat in Chicago.* That was the first I heard of Harper.
Q. That was in March, 1887?
A. Yes, sir.
Q. Did that keep up in the newspapers down to the time of the 15th of June, more or less, of discussion of it?
A. No, not particularly; it kind of died out.
Q. How early in March was it?
A. I do not remember.

"Mr. James M. Sherman, of the firm of Poole & Sherman, and a member of the Board of Trade, being examined, testified as follows (Rec. 217):

Q. Were you on the floor of the Board of Trade engaged in business during the spring of 1887, and up to the middle of June?

A. Yes sir.

Q. Please state whether or not there was any unusual movement or excitement in the wheat market during that period.

A. There was in April and May, and also in June.

Q. Please state whether or not the transactions in wheat were what is called 'running a corner.'

A. That was the general impression on the Board.

Q. By whom was it considered to be run, or for whose account?

A. It was for Cincinnati parties. The principals were variously stated, the real principals, but it was most of it done through Wilshire, Eckert & Co., supposed to be done.

Q. Was Mr. J. W. Hoyt known as interested in that deal?

A. His name was mentioned also; also Mr. Harper's; also Rockefeller's; also another Standard Oil man in Cincinnati.

"Also on page 218:

Q. Please state how generally it was understood that a corner was being run by Cincinnati parties.

A. It was largely believed by most every man on 'Change.

"Mr. Abner M. Wright, who was the president of the Board of Trade in Chicago in the year 1887, testified as follows (Rec. 257):

Q. Do you know, from rumors and reports which came to your knowledge, by whom the corner was said to be run, and in whose interest, stating in that connection who were the brokers who were managing the deal?

A. Well, the information that we have in regard to transactions of that kind on the Board is general; the information is generally indirect, largely inferential.

Q. I am merely asking as to the rumors that were occurring.

A. It was generally understood that parties in Cincinnati had the market, as the term was; that they were the owners of the wheat and of the contracts which were maturing that month.

Q. Please state whether that was a general understanding, and whether rumors or reports to that effect were current upon the Board.

A. I think that is so.

"Also on page 212:

Q. Do you refer to anybody else, known to you personally, in connection with what you call the Cincinnati clique?
A. Besides Wilshire, Eckert & Co.?
Q. Yes.
A. No personal knowledge of any other.
Q. What you say in reference to their being Cincinnati parties, outside of what you have just stated, is based wholly upon rumor?
A. I knew nothing of them except what I have heard from general report on the Board of Trade, what I have seen in the newspapers, and what I have heard in the course of the trials at Cincinnati.
Q. The course of what trials?
A. The Harper trial and the Hopkins trial.

"Finally, when the crisis came, on the 14th of June, the Fidelity Bank, in its own name, telegraphed the Exchange Bank, invoking its protection of Wilshire's trades with Kershaw & Co., and the Exchange Bank answered in its own name, assuring the Fidelity Bank that if Wilshire came along with the 'six zebras' the deal would be saved. Do you believe that this excited no suspicion of Harper's connection with the deal, or of the use of the Fidelity Bank's name in its prosecution?

"It was a singular item of evidence, that of Mr. Dewey, cashier, as to one portion of the interview at the bank on the 15th of June (Rec. 231):

"'Before the conclusion of the interview I turned around to Mr. Wilshire and said: "Now, gentlemen, I want to ask you one question. It is this: Is the Fidelity National Bank perfectly solvent?" Eggleston said to Wilshire, he said: "Joe, I have known you since you were a boy. I want you to answer Mr. Dewey the straight question." Wilshire laughed, and said: "You might as well ask me if your own bank is solvent." He emphatically declared the bank was so.'

"What led Mr. Dewey thus to suspect the solvency of the Fidelity Bank? If it had no connection with the wheat deal, what was there in its remitting money in the ordinary course of busi-

ness at this crisis of the deal that might have excited suspicion as to the solvency of the Fidelity Bank, with its $2,000,000 of paid-up capital? Was there any thing in its sale of a sight draft in the ordinary course of business to excite suspicion, or its receipt of $200,000 upon deposit, as mentioned in its letter of advice, to create any distrust?

"The real danger of the wheat deal, as we all know now, was the insolvent condition of the Fidelity Bank. If its treasury had been full, in place of being stripped bare by the drafts through the Exchange Bank, the wheat deal would have been all right. It is curious how Mr. Dewey was conscious where the real peril was.

"I need not to assure the court that men of sagacity, in general, are in the management of these great financial institutions, and sagacity was not lacking in the American Exchange Bank. The motive that prompted this inquiry of Wilshire prompted the telegrams to New York to ascertain whether this daft was drawn against funds, and would be paid by the Chemical National Bank. Upon this evidence we claim:

"*First*—That the paper in question is invalid by reason of the illegality of the transaction in which it originated.

"*Second*—That the appellee is not a *bona fide* holder for value, without notice, of this paper.

"*Third*—That the appellee was not in the exercise of ordinary prudence in crediting Kershaw & Co. with money upon the faith of such paper.

"As to the first of these claims, that this paper is void by reason of the illegality of the transaction, upon this evidence, we submit to the court that the appellee knew every circumstance affecting the title of Kershaw and Co. to it that was known to Kershaw & Co. themselves. If Kershaw & Co.'s title was invalid, for any season, the Exchange Bank is chargeable with knowledge of every fact and circumstance whereby the title of Kershaw &

Co. was rendered invalid. Under these circumstances the appellee can not recover, unless Kershaw & Co. could recover if they themselves were the parties in this case. It simplifies the question, so far as it depends upon the illegality of the transaction, and the invalidity of the draft as a consequence of such illegality, to consider the case as if it arose upon such a bill filed by Kershaw & Co themselves.

"The question is not, as our adversaries put it, whether the court would enforce a contract for the sale of this draft by Kershaw & Co. to the appellee bank; but it is whether Kershaw & Co. had an invalid title to the draft, which the appellee had notice of, and whereby the appellee can not be regarded as a *bona fide* indorsee for value.

"Our adversaries say that 'the statute of Illinois, so far as it relates to contracts made in attempting to corner the market, is only declaratory of the common law.'

"The statute referred to is a follows (1 Starr & Curtis Stats. 1885, p. 791):

"'178. *Gambling in grain.* Sec. 130. Whoever contracts to have or give to himself, or any other, the option to sell or buy, at a future time, any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of any such commodities therein, *or corners the market, or attempts to do so, in relation to any such commodities*, shall be fined not less than $10, nor more than $1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

"'179. *Gaming contracts void.* Sec. 131. All promises, notes, bills, bonds, covenants, agreements, judgments, mortgages, or other securities or conveyances made, given, granted, drawn, or entered into, or executed by any person whatsoever, when the whole or any part of the consideration thereof shall be for any money, property, or other valuable thing, won by any gaming, or playing at cards, dice, or any other game or games, or by betting on the side or hands of any person gaming, or by wager or bet

upon any race, fight, pastime, sport, lot, chance, casualty, election, or unknown or contingent event whatever, *or for the reimbursing or paying of any money or property knowingly lent or advanced at the time and place of such play or bet, to any person so gaming or betting*, or that shall during such play or betting so play or bet, shall be void and of no effect.'

"The case of *Pearce* v. *Foote* (113 Ill. 228) decides, among other things, that the notes, etc., given upon dealings prohibited in the former of the above sections are covered by the denunciation of them in the latter section. The court further decided that 'there is and could be no such thing as agency in the perpetration of the crimes or misdemeanors prohibited by this act. All persons actively participating are principals.'

"In the still later case of *Coffman* v. *Young* (20 Ill. App. 76) it is declared to be settled that where a broker undertakes to deal for his principal in contravention of this statute, and in doing so makes disbursements or pays losses growing out of such dealings, he can not recover the money so paid, or his commissions.

"It is true that both of these cases arose in reference to dealings in options; but that is prohibited by this law in the same way that 'cornering the market, or attempting to do so,' is prohibited. And contracts made in violation of the latter provision, equally with the former, are denounced as gambling contracts.

"If, as we assume, for the purpose of this argument, Kershaw & Co. were, as brokers for Wilshire, cornering or attempting to corner the market for wheat in Chicago, it was a crime denounced by this law. The draft in question to the order of Kershaw & Co. was made to them in violation of this law. Indeed, the money advanced to them by the appellee bank was knowingly loaned or advanced at the time in the course of the unlawful dealing which constituted the attempt to corner the market, and to aid them in the attempt; which is the very thing made criminal by the law.

"It is said of the case of *Raymond* v. *Leavitt* (46 Mich. 447) that it does not sustain the syllabus of the case which we quoted. And this because an examination of the case shows that the plaintiff, who had loaned money to the defendant for the purpose of controlling the wheat market, was to be repaid the money and one third of the expected profits, if any were realized, in place of interest for its use.

"Do learned counsel mean to say that a party is only to be regarded as 'a direct participator in the illegal transaction, and a sharer in its fruits,' who is to have a share in the profits as such? It will be difficult to maintain such a proposition. Kershaw & Co. were to have a commission for prosecuting the illegal enterprise; they were to borrow money for its prosecution, and the appellee bank had become interested by advancing them money in its prosecution, upon the security of the wheat bought in attempting to corner the market. Say the court, in the case cited (page 452):

"'We must willfully shut our eyes before we can fail to see that a combination between a man who furnishes money and dealers who manipulate the market, when the money invested is but a trifling percentage of the property to be handled, and where the only intent is to produce unnatural fluctuations in prices, is entirely outside the limits of buying and selling for honest trade purposes. It is the plainest and worst kind of produce gambling, and it is impossible for any but dangerous results to come from it. . . . If parties see fit to invest their money in such ventures, they must get it back by some other than legal measures.'

(See Article by A. McKean, 16 Central L. J., p. 227.)

"The appellee is not in the position of one that has lent money to the loser with which to pay the debts incurred in illegal transactions. The learning and research exhibited by our learned adversaries upon this proposition, as upon that of the rights of a vendor, who knows that his vendee proposes to make an illegal use of the property he buys, is entirely beside the questions in-

volved in this case. These questions are: Did Kershaw & Co. have a valid title to this draft, and did the appellee have notice of the invalidity of their title? Did it knowingly advance money to Kershaw & Co., and acquire from them this draft by indorsement, at a time and for a transaction which the law pronounces unlawful, or under such circumstances that it can not recover of the Fidelity Bank, that received no consideration for this draft?

"We are told that it is not illegal in Illinois *to pay* 'debts incurred in an attempt to run a corner in wheat.' Is it illegal in that State to lend or advance money to aid one attempting to run a corner in wheat to accomplish the attempt? Is the contract of indorsement of a note or draft, given and transferred for that purpose, a valid contract or agreement? We apprehend that a loan of money to Kershaw & Co., avowedly made to enable them to run a corner in wheat, which they are at the time attempting to make, is illegal under this statute. We apprehend that a bill to their order, delivered to them avowedly for that purpose, and for no other consideration, is void in their hands, and in the hands of every person who acquires it from them with notice of the purpose and consideration upon which it was delivered to them. At any rate, these are the questions that arise in this case, and that our learned adversaries wholly fail to discuss.

"Neither Wilshire nor Harper nor Kershaw & Co. had bought this paper of the Fidelity Bank, or paid that bank any consideration for it. It was obtained by Wilshire, as the answer charges and the proof shows, in the execution of the conspiracy to rob that bank. It was delivered by Wilshire to Kershaw & Co. to use in attempting to corner the wheat market, and for no other consideration; and this fact the Exchange Bank knew.

"And it advanced money upon it to Kershaw & Co., in its own expressive language, 'to save the deal.'

"There are two infirmities in the title of Kershaw & Co. to this paper: the one that it was obtained by them through Wilshire from the Fidelity Bank by this fraud and crime, without any consideration to the Fidelity Bank; the other infirmity is that it was delivered by Wilshire to Kershaw & Co. solely to use in the attempt to corner the wheat market in Chicago, and for no other consideration. It is the latter infirmity that we are now discussing. It is shown that this paper is infected with fraud and illegality in its inception. There can be no controversy about that. And under the decisions of the Supreme Court, cited and affirmed in the *Comm'rs of Marion County* v. *Clark* (*supra*), the burden is thereupon cast upon the complainant to show that it is a *bona fide* holder without notice of the prior infirmities of the title between the antecedent parties to the instrument; and it is also bound to show that its own action in lending or advancing money upon the instrument was under such circumstances that its acquisition of the paper was not tainted with illegality.

"It is useless for us to criticise the great mass of the authorities cited by our learned adversaries, for they are not presented upon the questions that we submit, and that we think arise upon the facts in this case.

"Our adversaries state in various parts of their argument that the appellee was led by the Fidelity National Bank to believe, and did believe, that Wilshire had purchased from it the draft and certificate of deposit in suit. And again, that this paper was issued to be treated as money by the appellee, and it was so treated. And again, that the defendant is estopped to deny that the Fidelity Bank received value for the drafts it issued. The Fidelity Bank had made no representation to the appellee, outside of the instrument itself, that it had received the money or any valuable consideration for this paper from either Wilshire or Kershaw & Co. No other purpose that it should be

used as money can be imputed to the Fidelity Bank except such as arises upon the face of the instrument, and no estoppel by any facts, outside of the paper itself, is pleaded, or shown by the evidence. If they regard the transaction as equivalent to one in which an individual comes with money in hand, they ignore its real character, because when he comes he comes with what purports to be his own, having the possession which conclusively implies title and ownership, and the right to use it as he sees fit. The appellee's claim is as an innocent indorsee of the bill, and if it can not sustain that claim, or if the bill was absolutely void in the hands of the indorser, its action must fail.

"Our adversaries also argue that there is nothing in this case to show that any part of the proceeds of this paper was used in the payment of losses upon gambling contracts. It is apparent from its connection that what our adversaries mean is, that the record does not show affirmatively that Kershaw & Co. were buying options, and that their transactions were illegal, as being options. But the ground upon which we affirm that the proceeds of this paper were used in an illegal gambling contract is, that the statute has made contracts entered into in cornering the market, or attempting to corner the market, gambling contracts, and as such has denounced them as void and of no effect.

"The authorities go much further in support of the position that we claim in this case than the facts with which we are dealing require us to go. It is settled law, as we understand the decisions, that if this paper was void for the reason claimed in the hands of Kershaw & Co., no holder for value, however innocent and ignorant of the facts, could acquire a title to it, or maintain an action upon it against the defendant in this case.

"In the case of *Root* v. *Merriam* (27 Fed. Rep. 909) the action was brought by an innocent *bona fide* holder of two promissory notes, executed and delivered by the defendants to Thomas Bennett, and indorsed by the payees to the plaintiff without

notice of any alleged infirmity. The defense was that the consideration upon which the notes were based was an illegal one, the same having been given in furtherance of a gambling contract, better known as an optional deal in grain. The notes were executed in settlement of losses sustained in the option dealings. The court (Dundy, J., delivering the opinion) say:

"'At the time the notes were given, the laws of the State of Illinois declared that notes given for such consideration should be deemed and held void. If the payees in these notes had brought suit in the State of Illinois to enforce payment of the same, the result could not have been considered doubtful. There would then have been no question of *good faith* on the part of any one for the court to consider. As the laws of the State of Illinois denounce such vicious transactions, and declare to be void notes given in connection therewith, it is not perceived how an innocent purchaser stands in any better attitude than the payees, who knew all about the facts, and participated in the wrongs. If the notes were *void* when given, they were void for all purposes for all time, and any number of transfers would not avail an innocent holder.'

"The cases cited in the note at the end of this decision sustain that position of the court to its full length, with the exception of the case of *Mitchel* v. *Catchings* (23 Fed. Rep. 710).

"In that case Brewer, J., delivering an oral opinion, held of the note given as security for continuing transactions in violation of the law, bought by one who suspected, but whom the court was compelled to find ignorant of the origin of the note, that he was to be regarded as a *bona fide* purchaser. The judge said:

"'I am, therefore, reluctantly compelled to say that I can not hold he was guilty of *mala fides* in purchasing the paper, and that being a *bona fide* purchaser, he is entitled to recover.'

Harper v. *Young*, 3 At. Rep. 670.
Traders' Bank of Chicago v. *Allsop*, 19 N. W. Rep. 863.
Barnard v. *Backhous*, 6 N. W. Rep. 252.
Same case, 9 N. W. Rep. 595.
Chapin v. *Dake*, 57 Ill. 295.
Bank v. *Harrison*, 3 McCrary, 316.

"But the principle which underlies the proposition for which we are contending has been very clearly established by the Supreme Court of the United States in the case of *Brown* v. *Tarkington* (3 Wall. 377). The case was this:

"The plaintiff brought suit against the defendants for the amount of certain promissory notes. It appeared that the defendants were stockholders in a bank in Nebraska, organized under a charter granted by the legislature of the territory. An act of Congress provided that no act of the territorial legislature incorporating a bank should have any force or effect until approved and confirmed by Congress. This bank, thus organized in violation of the act of Congress, undertook to do business, and issued bank-notes. The plaintiff aided and assisted, by his credit and means, the directors in circulating the bank's bills. A settlement of the accounts between the bank and the plaintiff was had, and thereupon the defendants executed one of the notes to the plaintiff for the balance found due by this settlement, and the other of the notes for money advanced by the plaintiff to the directors to redeem the paper that the bank had unlawfully put in circulation. The Circuit Court, upon the trial of this cause, instructed the jury that the banking business conducted and carried on through the means of this organization was illegal and void, and if the plaintiff had aided and assisted the officers and directors by his credit and means to carry on this business, and the consideration of the notes in question grew out of these illegal transactions, he was not entitled to recover. The verdict and judgment went accordingly for the defendant. The argument of the plaintiff in error had a striking resemblance to a portion of the argument of our learned adversaries in this case.

"Conceding for the sake of the argument that the court below was right in holding that the bills of the bank were not obligatory on the persons by whose authority they were put forth, the plaintiff in error claimed that the plaintiff lent his money to the de-

fendants to enable them *to pay* debts, and the payment of them was not illegal, whatever the incurring of them might have been. Here was a promise not the immediate or necessary offspring of the illegal acts, not tainted by their infirmity, but standing on the loan of the money, and such promise was good. But the Supreme Court, Chief Justice Nelson delivering the opinion, affirm the judgment of the Circuit Court, saying, 'a note or demand growing out of the illegal transactions is as infirm in the eye of the law as the implied promise that existed previous to the giving of the notes.'

"The same court decided, with more extended discussion, the same principle in the case of *Davidson* v. *Lanier* (4 Wall. 447). In this case the plaintiff, Davidson, drew a bill of exchange, which was accepted by one McMahon. The consideration of the bill was money lent by McMahon to enable the officers of the corporation that had engaged in the illegal business of issuing bank-notes, made illegal by statute, to redeem the bills that had been issued. The Circuit Court having charged, in substance, that if the notes were given for the purpose of enabling the company to put the bank into operation, in violation of the law, the defendants would be entitled to a verdict, further charged in its fifth charge:

"'If at the time the bills were given the holder, McMahon, knew that the money would be used for the purpose of carrying on the banking company contrary to the laws of Tennessee, if the banking company was then in operation, then the consideration of the bills is not affected by the use made of the proceeds of the bill, and the plaintiff is entitled to recover.'

"The Supreme Court, Chief Justice Chase delivering the opinion, reversed the judgment upon the ground that this fifth charge was erroneous. The court says in regard to it:

"The jury must have understood that in the judgment of the court a contract in consideration of aid in promoting the objects

and effecting the purposes of an illegal banking company, when once in operation, was valid. . . . The object of this statute was the protection of the people against the evils of an unauthorized currency—than which hardly any object of legislation is more important. . . . In the construction of this act, it was the duty of the court below, as it is ours here, to give effect to its obvious intention, if that can be done without disregarding settled rules of interpretation. . . . What, then, is the true sense of the prohibition—to erect, establish, institute, or put in operation any banking company, or to issue any bills or notes with intent or purpose to do so? . . . To establish a company for any business means complete and permanent provision for carrying on that business, and putting a company in operation may well include its continued as well as its first or original operation. . . . We must construe the act, therefore, as covering with its penal prohibition the whole range of devices by which illegitimate currency is imposed on the community. . . . It was quite clear, upon the evidence, that McMahon entered into the transaction, which resulted in the bill sued on, in the expectation of profit from aiding the operation of the prohibited banking company. . . . With this view of the statute and of the evidence, we can not distinguish this case from that of *Brown* v. *Tarkington* (3 Wall. 377). In that case we held that notes given for a balance found due on a settlement of accounts with an illegal banking company, and for advances to redeem its circulation, could not be enforced in favor of a payee who had been participant in the illegal business.'

'Is it not clear that Kershaw & Co. were 'participant' in the illegal business for the transaction of which they received this paper? Nay, is it not clear, in view of the evidence, that the appellee itself, in advancing the money to Kershaw & Co. to sustain them in the prosecution of this attempt to corner the wheat market, was 'participant' in the illegal business?

"Probably the case most replete with citations of authorities upon these questions, both in the argument of counsel and the opinion of the court, is *Cunningham* v. *Third National Bank of Augusta* (71 Ga. 400.)

"We have in the foregoing argument, in part at least, assumed that the appellee knew when it acquired the paper in suit that it

was given to C. J. Kershaw & Co. by Wilshire to be used in an unlawful attempt to corner the wheat market in Chicago. Our adversaries deny this, and we have followed their example in reserving this question until the close of their argument. It is a question of fact, to be passed upon by the court upon the consideration of all the evidence. It is one that by its nature is rendered peculiarly difficult for counsel by argument to aid the court in its consideration. The question whether there was an unlawful attempt to corner the wheat market in Chicago is a question, not of the existence of any thing, or the occurrence of any particular act at a specified time; it is a question of the existence of a course of conduct, with a particular motive or object in view. It is not unlawful to buy a hundred thousand bushels of wheat, or a million bushels, or any other specified amount; the question is of the existence of an attempt, by buying large quantities of wheat, with the purpose and object of thereby controlling the market and enhancing the price of the commodity. It is like many historical facts, difficult to be proved, beyond cavil, by direct evidence, such as would be competent in a court of law, and which yet are of the utmost notoriety. Probably no event in the commercial history of the country of the year 1887 was more notorious at the time than the attempt in question to corner the market in wheat in Chicago, and its failure, with the disastrous financial results which followed it.

"When, however, our adversaries come to deny that the appellee had knowledge that Kershaw & Co. and Wilshire were engaged in such an unlawful attempt, they assume the logical order of the inquiry to be:

"(*a*) Was an attempt made to corner the wheat market in Chicago?

"(*b*) Did Wilshire and Hoyt have knowledge that they were engaged in such an attempt?

"(*c*) Did Irwin, Green & Co. and C. J. Kershaw & Co. know that such an attempt was being made?

"(*d*) Finally, did the appellee know of the existence of such an attempt to corner the wheat market on the 15th of June, 1887, when the transaction occurred that is in controversy in these suits?

"It will be observed that our learned adversaries do not seriously controvert that there was an attempt, commencing in March and culminating on the 15th of June, to corner the wheat market in Chicago. The magnitude of the purchases made, reaching to between thirty and forty millions of bushels, in view of the visible supply of wheat in the country, of the storage capacity for wheat, and of the presence of actual wheat in Chicago, and of the possibilities of accumulating it there during the month of June, seems to be such, upon this evidence, that our adversaries have thought it impossible to controvert the proposition that an attempt to corner the wheat market of Chicago, the great central market of the world for wheat, was actually made. These facts, their argument tacitly admits, establish the existence of the attempt to corner the wheat market. It would seem to follow that general and not specific knowledge of the existence of these facts by Hoyt, and by Wilshire, and by C. J. Kershaw & Co., and by Irwin, Green & Co., and by the appellee, would be all that was necessary to charge them with knowledge of the unlawful attempt involved in and presented by the character of purchases that were made in Chicago in the prosecution of this design.

"It is further to be observed that the question is not whether these parties, or any of them, knew of this design from its inception, but whether they had knowledge of it on the morning of the 15th of June, 1887, when the appellee acquired the paper that is in suit in these cases. While, therefore, it might be true that in the beginning of these purchases Hoyt received his orders

from Hopkins, and executed them through Irwin, Green & Co., and Wilshire received his orders from Harper, and sent them to C. J. Kershaw & Co., and Irwin, Green & Co. and C. J. Kershaw & Co. might not have known, in the beginning, that the purchases made upon the orders through Hoyt and through Wilshire were in pursuance of one and the same attempt or design to corner the wheat market, yet that is not material to the present inquiry. The present question is, what was the knowledge of each and all of the parties on the 15th of June, when they assembled, before the opening of the Exchange Bank, in its office, and had the transaction involved in this case.

"Hoyt and Wilshire both became cognizant of the fact that they were acting in a common employment, and were co-operating in this business long prior to the transactions in this case. Our learned adversaries profess that they are unaware of where we got this information, and affirm that, however it may be, the material thing to ascertain is when Hoyt and Wilshire were known by the Chicago parties (meaning Kershaw & Co. and the appellee) to be co-operating. Mr. Kershaw was asked (Rec. 190):

Q. I forgot to ask you when you first learned that Mr. Hoyt was acting for the same principals?

A. Well, I think the first time I knew about it was on Decoration Day, whenever Decoration Day was. I think Mr. Hoyt was up here Decoration Day.

Q. The 30th of May, that is?

A. Yes, sir. I had a sort of an understanding, I got, I don't know why, I had a sort of a suspicion, but the first time I knew they were buying for the same people; they both knew I was buying for both, but up to that time, I didn't think either knew I was buying for both.

Page 190:

Q. Was n't Mr. Hoyt's account with you transferred to Wilshire's account about that time?

A. A portion of it was; but finally he gave me all the — he gave Wilshire a draft on us for balance to his credit.

Q. You were refusing to pay Hoyt his balance, insisting that it should be credited to Wilshire?

A. That is what brought it out.

Q. On the 30th of May?

A. On the 30th of May.

"Mr. Augustus W. Green, of the firm of Irwin, Green & Co., testified upon the same subject as follows (Rec. 204):

Q. About what time did you first learn that Kershaw's firm was buying for Hoyt or trading for him?

A. I can't say the precise time. I think some time in May. I heard incidentally from gossip on the floor.

Q. No, but I refer to—

A. [Interrupting.] Definitely?

Q. Yes.

A. Well, I could n't state.

Q. With reference to the time you ceased to buy, on the 20th of May, or about that date?

A. I should think it was about that time that I had more positive information.

"But this matter is put entirely at rest, so far as the statement of our brief that, long prior to the 15th of June, Hoyt and Wilshire, and, for that matter, Irwin, Green & Co. and Kershaw & Co., knew that they were co-operating with each other in an attempt in behalf of a common principle, by the letter of J. W. Hoyt, addressed to Irwin, Green & Co., on the 27th of May (Rec. 205):

CINCINNATI, May 27, 1887.

Messrs. IRWIN, GREEN & Co., Chicago:

Gentlemen,—As I promised, I have been pushing B. to get the figures for Tuesday's business, and this afternoon he gave the following as amount in bushels each party was to take care for Cinti. This, he says, does not include any arrangements N. Y. Cal. or Cleveland have made.

C. J. Kershaw & Co.,	7,500	
Geo. C. Walker & Co.,	2,000	This is the cash wheat he has.
I. G. & Co.,	4,500	
Rosenfeld & Co.,	1,000	500 M is the May you have.
	15,000 M	

He says he would not say any thing to R. & Co., but for you and C. J. K. & Co. to arrange matters between you as you may think best, so in case either one gets more than their share you can attend to it without trouble. Taking these figures, you two could pay for 11,500,000, which amount you will not get, but can fix for it. Kershaw may have some cash wheat. B. did not say.

Now you and K. can get together and see how you are fixed, and if not all correct, write so I can get it Sunday morning, and I will see B. and write so you can get it Monday. Do not use wire any more than you may have to.

Just have your message saying finished trade with W., and I will look for particulars by mail

Nothing new to write about situation. Think weakness to-day was to close out some tailers.

Yours truly, J. W. HOYT.

"It is hardly necessary to say to the court, if it shall have read this record, that the 'B.' referred to in this letter stands, as our adversaries point out, for the unknown principal of Hoyt. The account of his transactions being kept upon the books of both Chicago houses under this letter. 'I. G. & Co.' is Irwin, Green & Co. The figures stand for thousand bushels.

"When were either of these parties ignorant of the character of the transaction contemplated from its inception? Mr. Kershaw testifies (Rec. 193) that the understanding between his firm and Wilshire was that Wilshire was to furnish five cents a bushel margin, and Kershaw & Co. were to borrow the balance of the money to pay for the wheat when it was delivered, on the basis of seventy cents a bushel to be furnished by Kershaw & Co. And Mr. Kershaw informed Wilshire and Hoyt that the margin that would be required upon the purchases would be from one to two millions of dollars. It is probably best to give Mr. Kershaw's testimony upon this subject in his own language (Rec. 193):

Q. And that is whether there was any discussion between you and them (Wilshire and Hoyt) as to the amount of money it would take or you would be called upon to raise to put up seventy cents a bushel?

A. Well, I told them I know one time; I think I told Mr. Wilshire, and I think I told Mr. Hoyt, both, they would have to be so they could put their hands on a million or two dollars whenever ready; that would have to be ready.

Q. That was for their margin?

A. Yes, sir.

Q. You were to provide seventy cents a bushel?

A. Yes, sir.

Q. Was there any talk about how much that would call upon you to make provision for?

A. I think there were letters that went back and forth.

Q. Well, what was the amount?

A. I can't tell that. These are pretty large figures to think of. The letters are in the hands of the Receiver. There was a very voluminous correspondence carried on. I carried it on myself.

"Mr. Green, being interrogated upon the same subject—to wit, the amount of money that it was expected the firm of Irwin, Green & Co. would furnish in the prosecution of the deal as it was then contemplated—testified as follows (Rec. 201):

Q. Was it specified how much he would like to have you make arrangements to be able to furnish?

A. Well, I do n't know as it was, exact. He said, we might go and get whatever we could, even up to ten millions, if we chose.

Q. Do you mean by that that he made any request, or did he make request that you should make provision to be able to advance that amount of money for the transaction he was contemplating?

A. Well, he wished us to pay for all the wheat that we were to purchase.

Q. At what rate per bushel?

A. Pay for it at the market-price; what we bought it at.

Q. Do I understand you advanced the full price?

A. What is that?

Q. Do I understand your firm advanced the full price?

A. We had to pay for it at the full price, certainly.

Q. Did Mr. Hoyt margin it at all, as it is called?

A. He gave us security, certainly.

Q. You spoke of ten millions; what was it that was said about it at the commencement of those transactions?

A. Oh, at the commencement? Nothing was said about it at the commencement. It was afterward.

Q. Well, at what stage in the transactions?

A. Perhaps during May; I could not state exactly."

"On page 204 in the cross-examination he explains that it was ten millions of bushels that the firm was to provide for, and not ten millions of dollars that they were to provide.

"It thus appears that these Chicago houses were not so innocent, as our learned adversaries suppose, of the nature of the purchases that were contemplated at the inception, or in the early progress of these transactions, or of the relations of Hoyt and Wilshire by co-operating in the business for a common principal or principals. Indeed, in view of what they did, and of what they undertook to do, it seems to us somewhat of a caricature to talk of their being innocently and ignorantly 'used in an attempt to run a corner' while they were engaged in this business. Certainly, they were neither ignorant nor innocent of what had been done, and what it was proposed to do, on the 15th of June.

"It is quite true that no precise amount of wheat was specified in the beginning which either of these firms would purchase. It would be impossible to make any such specification with reference to any such attempt to corner the market. That would depend upon circumstances which would develop in the progress of the attempt; but the general magnitude of the transactions, which it was contemplated would be undertaken, and which are significant as determining whether it was designed to attempt to corner the market, was fully understood by all the parties thus far mentioned in the beginning and in the progress of this attempt.

"But how is it about the innocence of the appellee bank and its officers of knowledge of this attempt to corner the market on the 15th of June? Here let us say that we do not insist that 'a deal,' in the phraseology of the market and of men engaged

upon the Board of Trade, is necessarily an attempt to corner the market. It may be that a single purchase of a hundred thousand bushels of wheat might be referred to as 'a deal.' But these transactions in which Kershaw & Co. and Irwin, Green & Co. were engaged for Wilshire and Hoyt are 'the deal' to which parties and witnesses refer when they use that expression in this testimony.

"On the 22d of March, 1887, the cashier of the appellee sent the following letter, in which the italics are ours (Rec. 41):

MESSRS. C. J. KERSHAW & Co., Chicago:

Gentlemen,—You will see from copy of opinion from our attorney herewith inclosed that it is impossible for the bank to give such a guaranty as has been talked about. It, however, gives me great pleasure to assure you personally of the high opinion I have of the ability of your firm to care *for such a deal as I understand you now have on hand*, and my entire confidence that you will satisfactorily account for all moneys you may receive in connection therewith.

Please return the inclosed after perusal.

Yours, truly,
A. L. DEWAR, *Cashier*.

"What 'such a deal as I understand you now have on hand' refers to, and for which they wanted so extraordinary a provision as a guaranty from the appellee bank that they would properly account for the moneys coming into their hands, in connection with the purchases that they contemplated, is identified by the testimony of both Mr. Kershaw and of Mr. Dewey, the vice-president. Mr. Kershaw testified as follows (Rec. 192):

Q. Now, I forgot to ask you before a question, and that is whether or no, when you commenced these transactions for the Cincinnati parties, you applied to the American Exchange Bank to guarantee you your responsibility?

A. Well, I did one time try to see if I could not get some arrangement made by which any margin deposited—that is, would be guaranteed.

Q. By whom?

A. By the American Exchange Bank.

Q. State to whom you applied for that.

A. Well, I asked, I think, Mr. Dewey and Mr. Dewar.

Q. How early did you make that application to them in these transactions?

A. Well, it was pretty early, or when the margin got to be in large volume. I particularly did that because, as we hadn't a large capital, I wanted them to feel safe.

Q. What explanation did you make of your motive and what you wanted to the American Exchange Bank?

A. Because I was getting very large margins, as I thought, from the Cincinnati people, and it was to be put in the Fidelity Bank.

Q. You asked the American Exchange Bank; what explanation did you make to them about it?

A. I explained to them; I did n't know but what these people were afraid to put large sums of money in our hands, and tried to get it in some way, so it would be guaranteed; but they said it was impracticable.

Q. Who said it was impracticable?

A. Mr. Dewey.

Q. How early was that in the history of these transactions?

A. Well, I can't tell. I could not tell. I think I have something that would refer to it, but I can not. I think it was in May; might have been in April.

"Mr. Dewey testified as follows (Rec. 269, 270):

Q. What was the condition of their (Kershaw & Co.'s) account, say from the time it opened up to, say, the latter part of March, 1887; I do n't mean to ask for the exact figures, but as to whether the volume of business was increasing?

A. Yes, it increased from the time of their opening, especially beginning to increase in the months of February and March.

Q. Did this increase in the volume of their business lead you, as an executive officer of the bank, to make any inquiries of them; and if so, what?

A. Yes, sir; I did have occasion to make inquiries concerning the increase in the volume of their business, and found that they were receiving large orders for the purchase of wheat from one Hoyt, in Cincinnati, said by them to be a broker.

Q. Did you make any inquiry at all of them beyond that as to who the principals were behind the broker, Mr. Hoyt?

A. I did; I endeavored to ascertain through Kershaw & Co. who the principals were backing Mr. Hoyt.

Q. Do you mean by inquiries of Kershaw & Co.?

A. I endeavored to ascertain from Kershaw & Co., by inquiry of them, who were the backers of Mr. Hoyt and behind them.

Q. What did you learn from them?

A. They were unable to give me the names of the principals, but said to me that Mr. Hoyt's means were small, but that they considered him a man of honor and integrity, and he assured them — this is, in substance, the conversation — he assured them that the parties behind him were very strong and abundantly able to protect their trades.

"Page 270:

Q. Will you state the object of your visit (to Cincinnati in March), and what you did there?

A. We were told by Kershaw & Co. that the volume of the Cincinnati exchange would increase to quite an extent — in fact, it was increasing — and the deposits were being made for the account of Kershaw & Co. in the Fidelity National Bank, against which they desired to draw drafts for credit here, and I considered it would be a wise thing for me to go to Cincinnati and make investigations there to obtain the names or the strength of the principals, if I could, and also to have a conference with the Fidelity National Bank as our correspondents.

"This testimony of the vice-president is notable, not only as identifying what the deal was that was referred to in its letter of March 22d, and what the character of it, as it was then contemplated it would be, as communicated to him, but as recognizing the very obvious fact that the bank had its own means of information necessarily in the accounts of Kershaw & Co. and of Irwin, Green & Co., kept in their bank. In cross-examination upon this subject Mr. Dewey testified as follows (Rec. 272, 273):

Q. How long before you went to Cincinnati was it that Kershaw & Co. told you that the volume of exchange coming from Cincinnati would increase?

A. I think it was in the early part of the month.

Q. To what extent did he tell you it was likely to increase?

A. I don't think any definite figures were given.

Q. You were a good deal interested in the account that they were carrying in the bank, I judge, from your going to Cincinnati at that time in regard to it?

A. Yes, sir.

Q. Your interest in that account continued, I suppose, up to the 15th of June?

A. I had a banker's interest only in the account; it was one of those accounts that we would have to look after carefully, the means not being large, and keep ourselves protected with collaterals so as to know whatever business we did with them was on the safe side.

Q. And the character of the account in reference to the increase of the magnitude of it in May and June was, in view of your interest in the matter at that date, likely to increase, was it not?

A. I could not tell what the probabilities were.

Q. I mean it was likely to increase your interest in it, the character of the account, it was likely to increase your interest, and your attention to it, and observation of it, as an officer of the bank?

A. Yes, sir.

"Now, in addition to the general notoriety testified to by a number of witnesses of the character of the transactions that were being prosecuted by Wilshire and Hoyt, known as the Cincinnati parties, both on the Board of Trade and in the newspapers in Chicago, and in connection with this information to Mr. Dewey of what was contemplated in May, when we look at the bank account of Kershaw & Co. with the American Exchange Bank (see Rec. 255), is there any one so credulous as to make it worth while to argue to them that the appellee bank did not know what the character of the deal was when they telegraphed about it on the 14th of June to the Fidelity National Bank? Let it be remembered that Mr. Irwin was the president of the appellee bank, and the senior member of the firm of Irwin, Green & Co., and that Mr. Hamilton Dewar was the brother of the cashier of the American Exchange Bank, and the junior member of the firm of Kershaw & Co.; and that Mr. Charles B. Eggleston was the largest stockholder in the American Exchange Bank, present in the bank, in communication with its officers, nearly every day during the progress of this deal, and having himself advanced $8,000,000 upon the wheat that was being carried by the firm

of Kershaw & Co., of which firm he was a silent partner. And however difficult it may be for a man on the Board of Trade to tell when the market is being manipulated 'for the purposes of a corner,' we really do n't think that it was very difficult, or that this court will be persuaded that it was very difficult, for the appellee bank to have known what they were talking about, what kind of a deal it was that was in progress when they stopped paying Kershaw & Co.'s checks on the 14th of June, and telegraphed the Fidelity Bank that $600,000 on the morning of the 15th would be sufficient to save it. But when C. J. Kershaw, and Hoyt, and Wilshire, and Hamilton Dewar, and Mr. Dewar, the cashier, and Mr. Swift, the learned counsel for the bank, assembled in the bank's office, an hour before the bank opened on the morning of the 15th of June, and Mr. Wilshire produced the paper representing $600,000, which was then divided between Kershaw & Co. and Irwin, Green & Co.—Mr. Irwin appearing in the character of the president of the bank down to the time in the interview when $200,000 of this paper was delivered to him as the senior member of the firm of Irwin, Green & Co., upon which they purchased between 900,000 and 1,000,000 bushels of wheat on that day, in the performance of their part of the effort which was to be made to save the deal—when this distribution of the money was made, and when Mr. Dewar, the cashier, had, in the solemn manner described by him, investigated the solvency of the Fidelity Bank, the only matter occurring to him that he made any inquiry of Wilshire about, is it seriously contended by our learned adversaries that the appellee bank had no knowledge that there was any unlawful attempt being made to corner the wheat market in Chicago, or that this money would be used for that purpose?

"Assuming that we are making this argument with and to rational men, having general knowledge of how transactions and business involving millions of dollars, and the solvency, not only

of banking institutions, but also of entire classes in the community, are conducted, we did not suppose that such an argument would be very seriously pressed upon the court. Mr. Dewey and Mr. Dewar were not called upon by the appellee's counsel to swear directly that they had no knowledge that an attempt was being made to corner the market for wheat in Chicago, and they do not so testify. If they had done so, it would have destroyed their credibility as witnesses in this case.

"Assuming that when the means of knowledge have been so completely and thoroughly brought home to the officers of the appellee bank, as has been done by the evidence in this case, that it is equivalent to the proof of actual knowledge—and, indeed, it is the only proof of knowledge that such a case admits of—it seems to us that there is not room even to argue to a jury for 'a reasonable doubt,' if this were a suit in which the rule of evidence in a criminal case prevailed."

IV.

Another ground on which the appellant is claimed to be liable in this case arises from the doctrine of estoppel.

It is claimed that by reason of the correspondence of June 14, 1887, and the execution of this paper, the Fidelity Bank is estopped from denying the truth of the statements made in the letter of advice. This claim is undoubtedly much stronger than the one first noticed.

The estoppel can only be based on three acts or representations of the bank: 1. The telegrams of June 14th; 2. The execution of the letter of advice; and 3. Representations made by Wilshire.

The telegrams of June 14th, whether considered as representations or promises, were wholly outside the authority of officers of

a national bank, and were of themselves calculated to excite the suspicion of disinterested bankers. They on their face purported to negotiate in regard to a deal in wheat — to state what Wilshire would do provided his deals in Chicago were protected. They not merely state what Wilshire had said he would do — although even this would have appeared better in telegrams from Wilshire himself to his Chicago correspondents; it states positively that Wilshire will be there with the money. Such telegrams can certainly of themselves establish no liability against the Fidelity Bank. If they contain any promise on the part of the bank, such promise is wholly illegal and void. They can only be regarded as important in their bearing on the subsequent events.

The effect of the execution of the paper itself has already been fully considered.

Then consider the circumstances occurring at Chicago on the 15th of June, 1887.

Wilshire appeared alone at the Exchange Bank. He brought no letter or presented none from the Fidelity Bank. He was not the agent of the Fidelity Bank, and therefore no statements made by him can bind the Fidelity. Nor did he come with the credentials stated in the telegraphic correspondence. The Exchange Bank had telegraphed that if he was there with six hundred thousand dollars in currency, it would save the deal. He brought no currency. He brought nothing except what purported or was claimed to be obligations of the Fidelity Bank. On the 13th the Exchange wrote a letter to the Fidelity inclosing a a draft for $200,000 of C. J. Kershaw & Co. on it. This letter was not sent. On the 14th telegrams were sent about the payment of another on the Fidelity of $90,000, and an answer finally received that it was paid. These transactions, I think, were calculated to excite suspicion in the mind of a prudent man as to the position of the Fidelity Bank. And it did excite suspicion;

for on the morning of the 15th the question was put to Wilshire direct as to whether the Fidelity was solvent. Was there anything to excite these suspicions except its connection with Wilshire, Eckert & Co. and C. J. Kershaw & Co. in this wheat deal?

Another circumstance is, I think, important. On the evening of June 14th the account of C. J. Kershaw & Co. in the Exchange Bank was overdrawn $245,477.01, and they owed the bank a further sum of $280,000. Against this it held about 700,000 bushels of wheat. During the 14th wheat had declined 17½ per bushel in the Chicago market. The value of the collateral barely covered this indebtedness of $525,477.01, and the day had closed with a panic on the Board of Trade. Its security had shrunk over one hundred thousand dollars during the day, and unless the panic was stopped the next day might show a similar result. It was therefore a matter of self-interest to the bank to obtain $400,000 additional security from C. J. Kershaw & Co.; and this may well explain the fact that it received paper instead of the promised currency, and trusted to the statements of Wilshire in the matter.

But suppose our opponents are right, and that the Fidelity Bank is estopped from asserting the truth in regard to this letter of advice; it remains to consider how far this estoppel extends—whether to the entire amount stated in the letter or only to a part of it.

In the three cases of the appellee against the appellant—two of which only were appealed to this court—the latter has been required to allow claims to the amount of $400,000; and yet on page 259 of the Record it is admitted by the cashier of the appellee that the entire indebtedness of C. J. Kershaw & Co. to the bank, after charging back these three sums, is only about $325,000; so that, if these claims are paid to the bank, it will have a surplus of about $75,000.

This is not all. The evidence, I think, clearly establishes the claim that not over one hundred and seventy-five thousand dollars was ever advanced by the appellee on the faith of this paper.

The balance of its claim is one which would have existed had this letter of advice never been given.

Can then, under any circumstances, the American Exchange National Bank sustain a claim against the Fidelity National Bank on this letter of advice for a larger sum than it was induced by it to advance?

The letter was, in its inception, execution, and delivery, a fraud on the Fidelity National Bank, for which it had not received a dollar. The Exchange Bank claims to have received it in good faith without knowledge of this fraud; but if I am right in my claim, it never advanced a dollar on this letter of advice. The two drafts of $100,000 will fully cover its entire loss by reason of fraud of the officers of the bank. To go further, and to say that, notwithstanding this fraud, the court will still protect the bank, not as to *bona fide* advances made by it on the faith of the paper, but to enable it to collect a loss sustained from Kershaw & Co. on transactions with which this letter had no connection, or through it to enable Kershaw & Co. to receive a benefit which they could not by a direct suit, is to violate every principle upon which the doctrine of estoppel is based.

The object of estoppel is to make the aggrieved party whole, not to enable it to make a profit through the deceit practiced. In the present case it is claimed that the Exchange Bank took the letter of advice, and credited the amount to C. J. Kershaw & Co., and paid the checks of the latter in the honest belief that Wilshire, Eckert & Co. had deposited this amount of money in the Fidelity Bank to the credit of C. J. Kershaw & Co. When Wilshire handed this letter to the bank, had the latter, though receiving it, refused to advance to Kershaw & Co. any money on the faith of it, or had C. J. Kershaw & Co. never drawn any

checks against it, I think it is perfectly clear that no claim under such circumstances could have been sustained by the Exchange Bank against the Fidelity Bank upon it.

This letter was not given to pay past indebtedness of Wilshire, Eckert & Co. to Kershaw & Co., or of Kershaw & Co. to the appellee, and this was perfectly understood by the latter when it received it. The whole correspondence of June 14th, and the testimony of the witnesses as to what occurred at the appellee's bank on the 15th, show that the paper then given was for the purpose of protecting "the deal," and it can not on the doctrine of estoppel be appropriated to a wholly different purpose.

Bigelow (page 431) states that the origin of this doctrine is "to be found in the doctrine of equity, that if a representation be made to another, who deals upon the faith of it, the former shall make the representation good if he knew it to be false." And on page 437, one of the essential elements to sustain an estoppel is that "the other party must have been induced to act upon it."

The aggrieved party must have acted in the honest belief that the representation was true, and in such a case the other party must make that representation good; in other words, and to combine the two ideas, the party making the representation must make it good so far as it has in good faith been acted upon. Such is equity, and to carry it further is to pervert the entire meaning of the doctrine.

The Court of Appeals of New York, in *Merrill* v. *Tyler* (Selden's Notes No. 2, page 47), holds:

"A person is estopped *only so far as his words or conduct have influenced another party.* T.'s name was forged to a note, and M., after having advanced money on it, inquired of T. concerning it, and T. so spoke as to induce M. to advance more. Held, that the forgery was a defense to T. *only as far as to first advance.*"

This doctrine is very clearly stated by Chief Justice Beasley in *Campbell* v. *Nichols et al.*, 33 New Jersey Law (4 Vroom) 82. The syllabus is:

"But such evidence is competent to prevent a recovery of any amount beyond the sum which has been lost, by reason of the false representation which occasioned the plaintiff's damage.

"The doctrine of *estoppel in pais* should not be applied, except to the extent of preventing the party who has been misled from being defeated in a recovery of indemnification."

And the court (on page 88) says:

"The rule of *estoppel in pais* is intended for the protection of an innocent party, but its effect should not reach beyond the necessary limit of such protection. This, as well as other similar rules of law, must be kept within reasonable bounds, or else, in its turn, it will become an instrument of inconvenience and wrong. If the drawer of a note should through mistake admit its validity to a person who to the knowledge of such drawer was about to purchase it, after such purchase for full value, it is clear he could not aver his mistake, and set up the invalidity of the note as a defense.

"In such a case it is right that he should bear the loss whose carelessness occasioned it. But suppose the purchaser only gave part value for the note, upon what principle should he be allowed to recover more than the money thus paid of the drawer who, although he inadvertantly admitted his liability, in point of fact owes nothing on the paper. The true measure is that the party acting on the faith of a representation should be indemnified from loss by the application of the doctrine of the *estoppel in pais;* and these limits, as I think, take in the whole field of the doctrine. The rule is designed to protect against fraud, either in fact or in law; but the remedy does not extend beyond the injury. Neither good policy nor honest dealing requires that one who has made an admission which has influenced the conduct of another should be estopped by such admission from showing the truth of the case, except to the extent of permitting the person misled from recovering indemnification."

The same principle has been decided by this court in *Dresser* v. *Missouri & Iowa Railway Construction Company* (93 U. S. 92). The syllabus is:

"A *bona fide* holder of negotiable paper, purchased before its maturity upon an unexecuted contract, on which part payment only has been made, when he received notice of fraud, and a prohibition to pay is protected only to the amount paid before the receipt of such notice."

In this case the charge of the court below, which was approved by this court, was as follows:

"That if the fact of fraud be established, and the jury find from the evidence that the plaintiff paid $500 upon the notes without notice of the fraud, and that after receiving notice of the fraud the plaintiff paid the balance due upon the notes, he is protected only *pro tanto* — that is, to the amount paid before he received notice."

And the case is especially applicable to the present one, as this court on page 97 cites with approval *Williams* v. *Smith* (2 Hill, 301), using the following language, which seems decisive of the present issue:

"The cases are numerous that where a *bona fide* holder takes a note misappropriated, fraudulently obtained, or without consideration as collateral security, he holds for the amount obtained upon it, and for that amount only."

The letter of advice was obtained fraudulently and without consideration from the Fidelity Bank. The appellee bank did not pay the amount named in it at the time of receiving it, but it gave credit to Kershaw & Co., and paid their checks against it. As already shown, it received it with full knowledge that it was not intended to pay past indebtedness either of Wilshire to Kershaw or of Kershaw to the bank, but to protect the wheat deal; and therefore only such advances as in good faith the bank made to Kershaw on the faith of the letter can be protected.

It is argued by counsel for appellee that as the appellee accepted this letter of advice, and on the strength of it entered into the relation of debtor and creditor with Kershaw & Co. for the full amount thereof, the appellee at once became entitled to

recover from the Fidelity Bank the full of amount of the $200,000 mentioned in the credit.

There is no evidence that Wilshire owed Kershaw & Co. the amount of this letter. It is clear that if there was any such indebtedness, this letter was not intended to pay it. It is also clear that if Kershaw & Co. have a valid claim in this letter, they can recover it in an independant action in their own name. It is admitted that appellee has charged the amount of the letter back to Kershaw & Co. There is not a particle of evidence that any claim of liability has been made against appellee by Kershaw & Co. or any one else on account of this letter, except the suit for $10,000 hereafter considered. If there is any such liability, it should be set up in the case; if not, justice does not require that more money should be paid to appellee than it has advanced to Kershaw & Co., if they could not legally establish a claim.

The argument is wholly imaginative, and can not prevail against the clear defense which the Fidelity Bank has to this claim.

The counsel for appellee cites the case of *Platt, Receiver* v. *Beebe* (57 N. Y. 339), stating "that the case is peculiarly applicable because of the similarity of the principal facts to the facts in the cases at bar."

The note in that case was made by the defendant Beebe to the order of one Crawford, and delivered to him to be discounted, and the proceeds given to Beebe. Crawford took it to the bank and indorsed it, and asked to have it discounted and the proceeds placed to his own credit.

The bank took the note and advanced $1,800 upon it. The note not being paid, suit was brought against Beebe upon it.

The court held that the bank was the owner of the note—a holder for value; but only gave judgment against Beebe for the amount actually advanced on it to Crawford—which is exactly what I claim should be done in the present case.

Kershaw, these checks are written down by him in ink in the same list with the notes held by the bank and the large check just considered. They were all claims which the bank at that time considered itself bound to protect. The bank held grain as collateral to the indebtedness of Kershaw & Co. to the bank incurred before the 15th. Upon this grain there were charges for storage, and on the 13th Kershaw & Co. gave checks on appellee to pay them. It is true the checks were not paid until the 15th; but had they not been paid, the amounts would have been deducted from the grain when sold. The appellee on paying the checks only relieves its own security from liens upon it prior to its own. Certainly it could not have been in the faith of the letter of credit that such checks were paid.

There are three other checks on the list given by Kershaw & Co. to the Chicago & Pacific Elevator Co., which were doubtless of the same character, amounting to $27,692.93. Whether so or not, they were given prior to the 15th. And there are also other checks given to different parties prior to that date. These checks were not paid until the 15th.

I claim that the appellee had no right to pay on the faith of this letter of credit checks given prior to the 15th.

The Fidelity Bank can not be estopped by the mere presentation of the letter of credit. Had that letter of credit been stolen from the Fidelity Bank, it not being in negotiable form, the holder could have acquired no rights by virtue of it. The Fidelity Bank, if liable at all on this paper, is liable because of its previous correspondence with appellee. It had notified the latter that Wilshire would go to Chicago with the sum of $600,000, and when he appeared with that sum in the paper described in the evidence in this case the appellee may possibly claim that the Fidelity can not be permitted to deny that such paper was the $600,000 described in its telegram. But the purpose of taking that sum was as much the subject of that correspondence as the amount of

money. The object was to protect "the wheat deal," and no other. The appellee knew it. Its own answer shows this. It was itself interested in protecting that deal. Its correspondence shows that it had the same disposition as the Fidelity Bank, and the testimony shows that it had the same interest.

It may not be irrelevant at this point to consider the question of its interest in this deal, for it has an important bearing not only on this question as to how far it can use the letter of advice of the Fidelity Bank, but as to the *bona fides* in receiving the letter.

It is true that the officers of the bank all testify that at the close of business on the 14th the bank held ample collateral for all the indebtedness of Kershaw & Co. to it. Was such the fact? Exhibit 100 shows that, including the storage checks of $28,394.54, which, as we have seen, it was bound to protect, Kershaw & Co. owed the bank after deducting their credit balance $561,000, and that the collateral only amounted to $489,000, counting wheat at seventy cents. There was therefore on that day a deficiency of $72,000 in the collateral held by the bank. And although there is no evidence that the price of wheat fell below seventy-one cents during the panic, when sold the collateral only realized $449,194. On the collateral as sold there was a deficiency in amount of $112,000. The bank therefore, as its officers looked over the ground that morning, must have felt that it had a large interest in supporting the market. And this interest is to be considered, and it has great force, both on the question of the good faith of appellee in accepting this paper, but also as to compelling it to use it only for the purpose for which it was intended.

It was not sent to pay the past indebtedness of Kershaw & Co. to the bank or to any other person, or to pay indebtedness of Wilshire to Kershaw, but to protect the market in future operations. The past was gone; it was the future to which each party on that morning eagerly looked.

I hold therefore that the appellee, if entitled to retain this paper, can only do so as to advances made by it, on the faith of it, to Kershaw & Co. on checks given after the paper was received.

Deducting these several sums from the amounts charged on the 15th, and it leaves $175,271.49 of checks dated on the 15th paid by appellee. Deducting only the storage checks, which it was bound to protect, and the check paid on the 13th, and it leaves only $211,536.24 that can be claimed to be paid on the faith of this letter of advice.

And it seems to me that this is the largest sum which, under any circumstances, appellee can claim as against the paper handed to it by Wilshire on the 15th of June. This is all that the bank has paid out in money by reason of receiving the letter of advice and two drafts of $100,000 each. One hundred thousand dollars of this has been allowed in the case not appealed from; the balance must be settled in the two cases in this court.

The counsel for appellee also claims that as the letter of advice was not indorsed by Kershaw & Co., they had no right to charge it back, but that they are entitled to hold the bank for the full amount. And yet the cashier of appellee (page 259) testifies that it was charged back to Kershaw & Co. on the books of the bank, and he states the balance of the indebtedness after it and the two drafts were charged back.

Mr. Orr testifies that upon another check of about $10,000, which was refused payment by the bank, suit has been brought and a judgment secured.

It is, however, claimed in addition that the bank suffered further in the depreciation of the collateral held by it for advances to Kershaw & Co., including the check for $256,818.18 just described. It claims that it had stopped in the evening of the 14th paying Kershaw & Co.'s checks, and was entitled to sell out the securities held by the bank, but was induced by the acts of

the bank to give further time, by which it lost in the further depreciation of wheat.

To this we answer:

First—The Fidelity Bank had no power to agree, either directly or indirectly, to protect another bank from the danger of such loss. It had no power to protect the deal, and the Exchange pretends that it had no intimation that the Fidelity was interested in the deal. The only purpose that could be claimed for the letter was to furnish a fund from which Kershaw & Co.'s checks could be paid.

But, *second*—There is no evidence that the Exchange Bank sustained any loss whatever by reason of the letter in controversy in the respect now under consideration. It can not be claimed that the telegrams of June 14th from the Fidelity Bank gave the Exchange Bank any claim against it for delaying to sell out the securities of Kershaw & Co. Those telegrams were mere statements of what Wilshire expected to do, and which he undertook to do. They do not bind the bank to make good those statements. Had Wilshire not gone or not taken with him $600,000, there would clearly be no legal claim on the Fidelity Bank on that account. The delivery of the letter to the bank at ten o'clock on the 15th is the first act that imposes any liability on the Fidelity Bank. It does not appear in evidence that at that time the Exchange Bank had determined to sell out the securities held by it, nor that the delay of three quarters of an hour occasioned any loss to the bank. This delay is the only one for which the Fidelity Bank can be held liable. The payment of Kershaw & Co.'s checks stopped action on the part of appellee only so long as they continued to be paid. The condition of things which existed at the time of this stoppage was exactly the same as would have existed at the opening of the Board of Trade had no arrangement been made. No loss therefore in consequence of

the paper being taken by the Exchange Bank occurred to it more than the amount of the checks actually received.

Third—Admitting a liability on the part of the Fidelity Bank for loss occasioned by delay in closing out the collaterals held by appellee, it can not be held for a longer delay that the acts occasioned it. The evidence shows that at the close of business on the 15th wheat was 71, a fall of 3¾ cents per bushel since the previous evening. If appellee had determined on the evening of the 14th to close out this collateral, but was prevented by the securities sent it by the Fidelity, that reason did not operate beyond a quarter of eleven on the 15th. If not satisfied at that time with the securities held by it, it was at that time entitled to sell, and the Fidelity Bank is not liable for any damage sustained by delay in doing so.

I do not suppose, however, that this court can determine the exact amount which appellee should recover on the claim which I have been arguing. It is sufficient to show that it did not advance the full amount of the paper transferred to it, and that it is not entitled to recover more than the sum so advanced.

The cause should in such case be reversed, and remanded to the Circuit to ascertain the amount of the advances.

The counsel for appellee argues that the letter of credit had no limitation placed upon it by the Fidelity nor Kershaw & Co., and that the appellee had therefore the right to apply it first to overdrafts, and that the Receiver can not now claim a different application for it.

To this and all similiar arguments I answer that the whole transaction of $400,000—the letter of credit and two sight drafts of $100,000 each—was a fraud upon the Fidelity Bank. They were all obtained fraudulently and without consideration. They were obtained from the bank for the purpose of protecting the wheat deal, and this purpose was fully known to the appellee and the remittances solicited by it for that specific purpose. The

entire lot of paper was transferred to the appellee in the execution of this purpose. To permit it to be applied to any other purpose would violate the whole spirit of the agreement between the parties. They can only be applied to advances made by appellee to Kershaw & Co. upon the faith of these drafts and letters after receiving them.

We must then ascertain the entire amount of advances so made. The one draft has been allowed, reducing the amount of advance by one hundred thousand dollars. If the judgment in 1,110 in this court should be affirmed, it would reduce the sum that much more, and only the balance, if any, can be allowed in this case. Should that judgment be reversed, it would to that extent affect the balance due upon the letter.

But our claim is that the entire amount of $400,000 is affected by the fraud, and if the liability thereon is sustained, it can only be to the amount of advances made on the faith of it. The court will protect the bank in the matter so that no more than the actual advances made shall be recovered by appellee.

VI.

One question still remains to consider. The court gave judgment in this case against the appellant, ordering him to allow appellee's claim for $200,000, and as the Comptroller of the Currency had on the 31st day of October, 1887, declared a dividend of twenty-five per cent on the claims against the Fidelity Bank at that time allowed, the court further ordered appellant to pay interest on twenty-five per cent of the appellee's claim from the date of each dividend.

In this I claim there is error.

The funds of the trust represented by the appellee are in the treasury of the United States. The appellant has no power to

pay them out or to control them in any way. They are under the exclusive control of the Comptroller of the Treasury. The Government pays no interest on this fund, and the creditors derive no benefit from its remaining in the treasury.

I believe that it has been the invariable rule in the division of national bank assets to allow simply dividends on the amount of the claim, no matter when presented or allowed. Should the assets be sufficient to pay all the creditors in full, interest will be paid; but when the assets are insufficient to pay, the court will not take what belongs to one creditor to pay as interest to another.

In *White* v. *Knox*, *Comptroller* (111 U. S. 784), the court held:

"A creditor of an insolvent national bank, who establishes his debt by suit and judgment after refusal by the Comptroller of the Currency to allow it, is entitled to share in dividends upon the debt and interest so established as of the day of the failure of the bank; and not upon the basis of the judgment if it includes interest subsequent to that date."

The court further says, on page 786:

"The Comptroller decided that the payment to White should be on the basis of the amount due him on his adjudicated claims as of the date of the failure of the bank, because the dividends to the other creditors had been calculated in that way, and all he was entitled to was to share in the proceeds of the assets equal to what had been distributed to others during the pendency of the litigation. In this we think the Comptroller was right."

Again, on page 787:

"The judgment established the claim as a claim against the bank at the time of the insolvency, and the amount due when the judgment was rendered. Thus the claim was adjudicated, and the amount due at the date of the judgment ascertained; but for the Comptroller to pay the relator on the amount due him at that time, and the other creditors on the amount due them eight years before, when the insolvency occurred, would certainly not be making ratable dividends from the assets on all claims against the bank."

It is true the court in its decision says that the case before it is not one to recover interest on the dividends declared from the dates of declaring them; but this does not convey any intimation that if the case had been the one supposed, the decision would have been different; the court could easily, if disposed, have ruled so as to give the claimant that interest if he was entitled to it.

There is not a particle of difference in practical result between paying a dividend on the amount of the claim and interest added, and paying dividend on the original claim and adding interest on it. Every argument used by the court in the case quoted applies to the present one.

In *Bank of Bethel* v. *Pahquioque Bank* (14 Wallace, 402) the court says:

"But the judgment when recovered will not give the creditor any lien on the property of the delinquent association, nor secure to the judgment creditor any preference over other creditors whose claims are proven before the Receiver. All alike must await the action of the Comptroller of the Currency, and be content with a legal distribution of the proceeds of the assets collected by the Receiver and liquidated by the Comptroller, according to the act of Congress in such case made and provided."

In *The Chemical National Bank* v. *Bailey et al.* (12 Blatch. 480) the court says:

"An action of assumpsit by the holder of a claim against the bank to recover such interest will not lie against the Receiver of the bank or against the Comptroller of the Currency, but will lie against the bank." And, "The Receiver has no control over the assets except to pay these proceeds to the Treasurer of the United States, and would not therefore be liable to the plaintiff in any form of action."

The Receiver can not under the law pay this claim. It is paid by the Comptroller of the Currency. The present action only adjudicates upon the claim—whether it is a valid one against the

bank or not; and if valid, the amount of it. When adjudicated and found to be valid, the Receiver reports it to the Comptroller for payment, and the dividend is then paid upon the amount due at the failure of the bank. No penalty should be imposed upon other creditors because the Receiver deemed it his duty to reject the claim sued on in the present case until it was established as valid in a proper court. He has only done his duty in the premises. The Fidelity Bank, represented by the Receiver, had received no deposit as stated in this paper. It was one of the means used by the officers of the bank to appropriate its funds to their private use, and he would have been derelict to his trust if he had pursued any other course.

This is not a case calling for harsher treatment than is adopted in the ordinary distribution of the assets of an insolvent national bank.

For the reasons stated I ask this court to reverse the judgment of the Circuit Court, and to remand the case for further proceedings.

JOHN W. HERRON,
Solicitor for Appellant.

—IN THE—

Supreme Court of the United States.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank, } *Appellant,*

VERSUS

AMERICAN EXCHANGE NATIONAL BANK OF CHICAGO, } *Appellee.*

Brief for Appellant.

The suit below was brought by the appellee to compel the appellant to allow, as a valid claim against the trust represented by him, the amount claimed to be due on a bill of exchange for $100,000. This bill of exchange was drawn by B. E. Hopkins, as assistant cashier of the Fidelity National Bank of Cincinnati, on the Chemical National Bank of New York in favor of the appellee. It was dated Cincinnati, June 14, 1887, and payable at sight.

The answer denies that the appellee was the owner of said bill of exchange; alleges that it came into its possession without any consideration for the same paid by it to the Fidelity National Bank; and that the Fidelity National Bank did not at any time receive any consideration whatever for the draft.

The testimony discloses the following facts: The Fidelity National Bank of Cincinnati was organized under the National

Banking Act, with a capital of $1,000,000. E. L. Harper was vice-president and the actual manager of the bank; Hopkins was the assistant cashier. Harper entered into a large speculation in wheat in Chicago, employing as brokers J. W. Wilshire & Co., of Cincinnati. They employed C. J. Kershaw & Co. as their Chicago correspondents. Harper remitted to Chicago large sums of money to be used in this speculation, and in so doing appropriated to his own use the funds of the Fidelity Bank. These remittances were mainly made to the appellee for the account of C. J. Kershaw & Co.

On the 14th of June, 1887, this speculation had reached a critical point, and more money was demanded in order to sustain it. On that day the appellee telegraphed to the Fidelity Bank asking if $200,000 had been deposited to the credit of Kershaw & Co. The answer to this was that it had not been made. On the same day the Fidelity telegraphed to the appellee as follows:

"Joseph Wilshire will be at your bank to-morrow morning with six hundred thousand dollars to make his trade with Kershaw and others good if they are protected until he arrives."

The appellee replied to this on the same day:

"If Wilshire is here to-morrow morning with six hundred thousand dollars currency, the deal will be safe. Answer quick."

The Fidelity replied:

"Wilshire will be there on the morning train."

Wilshire did go to Chicago that night and took with him—

1. A draft of the Fidelity on the Chemical National Bank of New York for $100,000, payable to the order of C. J. Kershaw & Co.

2. The draft sued on in this case.

3. The paper sued on and now in this court in case No. , purporting to certify that Wilshire, Eckert & Co. had deposited

in the Fidelity to the credit of the appellee $200,000 for the use of C. J. Kershaw & Co.

4. Two drafts of $100,000 each on the Chemical National Bank, one payable to the order of Wilshire, Eckert & Co., and the other to the order of J. W. Wilshire, making in all $600,000.

Wilshire arrived in Chicago the next morning, and met at the bank of the appellee Kershaw and certain officers of the bank. After some conversation and negotiation he delivered, either to Kershaw or to the cashier of the bank, the letter of credit for $200,000 and the two drafts which I have described as Nos. 1 and 2. The cashier handed them to the assistant cashier, who called his attention to the fact that the draft in controversy in this case was payable direct to the order of the bank, and they then considered it advisable to telegraph to the Fidelity in regard to it; and the cashier thereupon told Mr. Kershaw that they would await advices from the Fidelity in reference to that draft.

The testimony of the bank officers in reference to the receipt of this draft appears in the testimony of Mr. Orr on page of the Record, and Mr. Dewar on page

The deposit ticket made for Kershaw & Co., after noting this draft, has this condition entered upon it by the cashier of the bank:

"Credited subject to advice from the Fidelity National Bank. We have wired for advice.

The telegram from the appellee referred to in this entry was as follows:

"Your draft on New York number sixteen four twelve delivered us this morning is made payable to our order. Why was this done and is the amount charged against us or is it intended for use of W. as he may direct. Answer quick."

To this the Fidelity replied on the same day as follows:

"We want number sixteen four twelve to apply on your account. Have wired parties."

And on the same day it wrote as follows:

"We charge your account $100,000 New York exchange to your order sent you to-day."

No money whatever was paid to the Fidelity National Bank for this $600,000 of paper.

The draft in controversy in this case was on June 15th charged on the books of the Fidelity Bank to the appellee; on June 16th an entry was made crediting to appellee $200,000, and charging that amount to Wilshire, Eckert & Co. No entries whatever were made on the books of the bank as to the other $300,000.

The court below gave a judgment in favor of the appellee, requiring the appellant to allow the amount of this draft, and ordering him to pay interest on the twenty-five per cent dividend which had previously been declared from the date of such dividend.

I claim that this judgment was erroneous.

I.

In the first place I claim that the court erred in giving a judgment for interest on the amount of dividend previously declared.

This is directly decided in *White* v. *Knox, Comptroller*, 111 U. S. 784.

In that case it was held that the receiver of an insolvent national bank was liable to pay a dividend only upon the sum due at the date of the failure of the bank, and not upon the amount of the judgment in the case; and every argument that can be advanced in this case in favor of interest is answered in the decision of that case. And I believe it has been the invariable rule in the division of national bank assets to allow simply divi-

dends on the amount of the claim, no matter when filed or allowed. Should the assets be sufficient to pay all the creditors, interest on all claims until paid would be allowed; but when the assets are insufficient to pay all, the court will not take what belongs to one creditor to pay as interest to another. The money is in the treasury of the United States, and can not be paid out except on the check of the Comptroller of the Treasury after the claim is allowed.

There is nothing in the present case to make it an exception to the general rule.

II.

We next proceed to consider whether the bill of exchange in question on the evidence of this case is a valid claim against the funds in the hands of the appellant.

The American Exchange and the Fidelity banks were the original parties named in the paper. There was no indorsement of it by the payee to a *bona fide* holder.

Ordinarily it is admitted that a want of consideration can be shown in a suit between the original parties, and it is also admitted that in the present case the Fidelity received no consideration whatever, and that the defendant in error paid nothing to the Fidelity.

But it is claimed that in the present case there was in fact a third party to the paper who was the owner of it, and who transferred it to the appellee for a valuable consideration. Wilshire, it is claimed, went to Chicago as the owner of this draft and there transferred it to the appellee, and that want of consideration can not be shown.

It will be noticed that there is no indorsement of this bill of exchange, and it is *indorsement* in a commercial sense which is

the usual form through which the *bona fide* holder of commercial paper is protected. The form of the draft expressed to the defendant the idea that it was a payment of money due to it by the Fidelity, and therefore to be charged to it. The defendant at once recognized this idea by its telegram to the Fidelity. This inference was made the stronger by the fact that at the same time the Exchange Bank was notified that the Fidelity had become its debtor in the sum of $200,000.

No other conclusion could have been drawn by the defendant in error from the paper itself, except that it was a payment on account of that or some other indebtedness.

To rebut this inference there must be something from the Fidelity itself to contradict it. Wilshire could not do it unless he was the agent of the Fidelity, authorized to represent it. This is not claimed—indeed is expressly repudiated by the counsel for the appellee. The Fidelity on application affirmed the character of the paper indicated by its form. Did it give a different character to it by what preceded its execution?

In the discussion of this question I desire to adopt a large portion of the brief filed in the Circuit Court by E. W. Kittridge, who at that time represented the Receiver. Mr. Kittridge discusses the whole question much more thoroughly than I could possibly do, and the limited time allowed me makes it necessary for me to adopt this course.

"Coming, then, to the presentation by the counsel for appellee of their position in reference to this, as disclosed by their brief, we find it to be that the draft in question was delivered by the Fidelity Bank to Wilshire as a purchaser, for valid consideration, and by him, as a remitter, delivered to the payee for value, whereby the payee or appellee, it is urged, became entitled to the rights of a *bona fide* purchaser by indorsement, for value, before maturity of the draft payable to its order.

"To this position we answer:

"*First*—That the appellee's bill presents no such case against the appellant. The allegation of the bill is simply that upon the 15th day of June, 1887, the appellee became and ever since has been the owner and holder of a certain draft, or bill of exchange, setting forth a copy thereof. There is no fact alleged in the bill showing that the appellee became the owner and holder thereof with any other rights than those of an ordinary payee of such a draft. There is no allegation of any issue or dellvery of the draft by the Fidelity Bank to any other person than to the appellee as the payee. It is clear that ordinarily, in an action between the payee and the drawer of such a draft, a failure of consideration paid to or received by the drawer presents a complete defense to thc action.

"The respondent's answer averred that the draft came into the possession of the appellee without any consideration whatever therefor paid by the appellee to the Fidelity Bank; and that the Fidelity Bank never at any time received any consideration from any person whomsoever for the said draft. These allegations constituted a good answer to the case made by the bill. No exception was taken to the answer by the appellee. The facts alleged, being true, constituted a good defense to the appellee's suit. If the appellee relied upon any facts in the mode of acquiring title to the draft, which made its position better or different from that of the payee of a draft generally, it was bound to allege these facts, and, as against the respondent's averment of a want of condideration for the draft, to sustain them by proof.

"But passing from the question of the sufficiency of the allegations of the bill to entitle the appellee to present the claim now made by its counsel in argument, and considering the validity of the claim upon the evidence in the case, the argument of the appellee's counsel in substance admits that the Exchange Bank

paid no consideration to the Fidelity Bank for this draft; and, in fact, that the appellee did not acquire the draft at all from the Fidelity Bank. They contend, however, that the appellee paid Joseph Wilshire a valuable consideration for it. And thereupon contend that the appellee acquired a better title to the draft than Joseph Wilshire had. For it is not pretended that Joseph Wilshire paid the Fidelity Bank any consideration for it. He never purchased the draft of the Fidelity Bank, either upon credit or otherwise. He never had or claimed to have any interest whatever in it. If he made such a claim, he was, beyond all controversy, not being an agent of the Fidelity Bank, conspiring with Harper to embezzle its funds. His manual possession of the draft was that of an embezzler, or an accomplice of Harper in an attempt to embezzle the money of the bank. The proposition of our learned adversaries should be examined with this relation of Wilshire to the transaction in full view, in place of adroitly withdrawing it out of sight, as their argument seeks to do.

"The claim is that the Exchange Bank acquired from Wilshire a better title to this draft than Wilshire himself had. The grounds of the claim are, first, that the Fidelity Bank represented to the Exchange Bank that Wilshire had purchased and paid for this draft; second, that by its purchase from Wilshire it became entitled to the rights of a *bona fide* holder for value of the draft as a negotiable instrument.

"The alleged reprentation of the Fidelity Bank consisted in its telegram of the 14th of June, that Joseph Wilshire would be at the Exchange Bank to-morrow with six zebras ($600,000) to make his trades with Kershaw and others good, if they would protect them until he arrived. To which the Exchange Bank had replied, that if he was there in the morning with six zebras currency, it would save the deal; meaning thereby that it would enable the successful consummation of the attempt, that had been

in progress for several weeks, to corner the wheat market. Was that correspondence a representation that Wilshire was the owner or purchaser from the Fidelity Bank of this draft, drawn to the order of the American Exchange Bank? The Exchange Bank, if it wishes to establish an estoppel founded upon that correspondence, is presenting no question of estoppel as it is applied to the maker or indorser of negotiable paper. It is the ordinary doctrine of estoppel proceeding upon the ground that one knowingly, by positive statements, makes a false representation of existing facts to another, knowing that he is about to act in a particular manner upon the representation; and it must appear that the party to whom the representation is made, although exercising ordinary prudence, was misled by it. This telegram of the Fidelity Bank contains no statement that this draft, which upon its face was in such form as to show that the legal title to it was not in Wilshire, was yet bought and paid for by Wilshire. The telegram said nothing of the kind, and the Exchange Bank was not misled by it. It knew, as soon as it paid sufficient attention to the paper to read it, that Wilshire was not the owner of the draft. It declined to credit it to anybody without instructions from the drawer. It failed to make the slightest inquiry of Wilshire as to what his title to it was. It either believed that Wilshire was an honest man, who would answer truthfully if he was asked about it, or it believed that he was a rascal, not to be trusted to tell the truth about it. If he was honest and truthful, why was he not asked about it? What man of ordinary prudence would fail to ask him if he had paid for this draft, and if he had, why it was not drawn to his own order? If he was a rascal, not to be trusted to tell the truth about it, what man of ordinary prudence would place $400,000, of which he had not the legal title, to the credit of his brokers, for his use in cornering the wheat market, at his request? This telegram of the Fidelity Bank contains no representation of any kind about the title to this paper. Upon its

face, the only action of the Exchange Bank that it contemplated was the protection of Kershaw & Co. until Wilshire arrived in Chicago. The Exchange Bank professes that it had no knowledge or suspicion that the Fidelity Bank or its officers had any connection with or concern in the wheat deal, or in Wilshire or his doings in Chicago. It is argued by its counsel that it honestly supposed that the Fidelity Bank was a stranger to those transactions, and these telegrams gave it no inkling to the contrary. If that was really the case, the appellee could not have supposed that the Fidelity Bank, in saying that Wilshire would be in Chicago with $600,000 to make his trades good, thereby meant to make any representation as to the ownership of the paper not yet drawn that Wilshire might bring with him, and the telegram contained no such representation. There was nothing in the connection of the Fidelity Bank with this business that warranted the American Exchange Bank in supposing that it contemplated any other action by the American Exchange Bank than that it should protect Kershaw, if it saw fit, and, as the telegram suggested, until Wilshire got there.

"It is undoubtedly true, upon the evidence in this case, that Harper and Hopkins were engaged in robbing the Fidelity Bank; and there can be hardly more doubt that Wilshire was aiding and abetting this robbery. It seems to us also to be true that, knowing the relations of the officers of the American Exchange Bank, and of Mr. Eggleston, its principal stockholder, to the parties conducting the deal in Chicago, Harper was led to believe, by its telegram of June 14th, that the officers of the American Exchange Bank were ready and willing to make a similar use of the funds and credit of that bank to support and carry on the deal or speculation in wheat in Chicago. But that can not work an estoppel in favor of the appellee. It is here to say that it acquired this draft from Wilshire. If Wilshire's only title to the draft was that he stole it, what is the position of the appellee

founded upon its purchase of the draft from Wilshire? The Fidelity Bank made no representations in respect to Wilshire's having purchased the draft. No inference which the officers of the American Exchange Bank may have made from the vague and indefinite statements in the telegram of the Fidelity Bank, to the effect that Wilshire would be in Chicago with $600,000, that Wilshire had purchased this draft for cash or upon credit, was warranted by the language of these telegrams. And, we repeat, the form of the draft itself, it being made not to the order of Wilshire, but to the order of the American Exchange Bank as payee, repelled any such inference.

"If the appellee's counsel have successfully assailed the credibility of Wilshire as a witness, and it otherwise appears, as it does appoar, that the Fidelity Bank received no consideration from him or from the appellee for this draft, and that it was received by Wilshire from Harper in the execution of the scheme to embezzle the funds of the Fidelity Bank, the question arises, What title has the appellee acquired by purchase from Wilshire?

"The learned counsel for the appellee claim, or that must be the scope of their claim, that the payee of a bill of exchange who pays value for it to one who is a stranger to it, and has really obtained it by embezzlement, becomes a *bona fide* holder for value, having the rights and title of an indorsee. Is that the law?

"Counsel cited in support of this view from 1 Parsons on Notes and Bills, 181. The text of the learned author is:

"'The payee is in general the immediate promisee of the drawer; in an action by the former against the latter a want or failure of consideration for drawing the bill is a good defense. . . . . If A for a good consideration moving from C to him procure B to make his note in favor of C, it should *seem* that it will be no answer to an action by C against B that the latter received no consideration for making the note.'

"The authorities cited in the foot-note in support of this statement that it should *seem*, etc., are the cases of

Munroe v. *Bordier*, 65 Eng. C. L. 861.
Horn v. *Puller*, 6 N. H. 511.
Glascock v. *Rand*, 14 Mo. 550.
Rogers v. *Morton*, 12 Wend. 484.
Ib., 14 id. 572.
Nelson v. *Cowing*, 6 Hill, 336.

"But these authorities, it will be found, do not sustain the proposition.

"*Monroe* v. *Bordier* was an action at law by the payee of a foreign bill of exchange. The declaration set out that the defendants, the drawers, delivered the bill to the firm of Coates & Co., who delivered it to the plaintiff, the payee named in the bill. The defendants pleaded that the bill was made and delivered to Coates & Co. upon their promise to pay therefor, and that they had not paid according to their promise. To this plea there was a replication, alleging that the bill was made and delivered to Coates & Co. for a good, sufficient, and valuable consideration—to wit, the amount of the bill. And to this replication the defendant demurred. Upon the argument of the demurrer, Cresswell, J., put the question to the plaintiff's counsel, 'Have you any authority to show that the payee may treat an intermediate holder as the true owner?' To which the counsel replied, 'Coates & Co. were lawful holders of the bill.' And the court, in deciding the case, held that upon the pleadings it must be taken that Coates & Co. were purchasers of the bill for a credit to them; the consideration therefor being the promise of Coates & Co., which is a good and valid consideration. That parties who buy a draft made to the order of a payee other than themselves, and, having acquired a good title themselves to the paper, transfer it to the payee for value, confer upon the payee a title that is not subject to be defeated by subsequent equities, or rights of set-off which

may arise between the purchaser and the drawer, may be conceded. It is but an application of the ordinary doctrine applicable to the transfer of choses in action, and not at all dependent upon the negotiable or non-negotiable character of the claim transferred. The doctrine is illustrated in the case of *Fuller* v. *Steiglitz*, 27 Ohio St. 355. The syllabus of that case is:

"'The assignment of a non-negotiable demand arising on contract, before due, defeats a set-off by the debtor of an independent cross demand, on which no right of action had accrued at the time of the assignment.'

"Coates & Co., in the case of *Munroe* v. *Bordier*, had bought the draft in question for a valuable consideration. No fraud was imputed to them in the transaction. They promised to pay for it at a later day, and the drawer had given them a credit upon this promise. This credit had been given with knowledge, which the transaction itself imported, that it was the intention of Coates & Co. to sell and transfer the draft to the plaintiffs, who were the payees, and who paid value for it to Coates & Co.

"The case of *Horn* v. *Fuller*, 6 N. H. 511, presented for consideration simply a question as to the weight of the evidence, upon the question whether the party who delivered the note to the plaintiff was a purchaser for a valuable consideration or otherwise.

"The case of *Glascock* v. *Rand*, 14 Mo. 550, consists of four lines, which import, so far as it can be determined, a like rule to that in *Horn* v. *Fuller*, 6 N. H.

"In *Rogers* v. *Morton*, 12 Wend. 484, which was an action by the payee of a note against the maker, the court held that the burden of proof was on the payee of the note, which he had received from a third party, to show that the case was an exception to the general rule that the consideration may be inquired into between the original parties to the paper.

"In 14 Wend. 575, between the parties, Senator Tracy, in delivering his opinion, upon page 592 shows that the payee of such a note is not in the position of an indorsee for value.

"*Nelson* v. *Cowing*, 6 Hill, 330, was an action by the payee against the maker of a note, originally brought before a justice of the peace. The justice had held that the production of the note by the payee, without other evidence, established that he was a *bona fide* holder for value. The court reversed the judgment of the justice on account of this ruling, holding that such was the law as applied to the title of the indorsee. But say the court:

"'It is otherwise when the action is brought by the payee named in the note, although it may appear, in point of fact, he was not a party to the transaction upon which the note was made. There is no presumption in his favor that he took the note in the usual course or mode of negotiating commercial paper. If the plaintiffs were in truth strangers to this note when it was made, they could not but see, on its being offered to them, that they appeared to be parties to it. This would very naturally lead to the inquiry as to how the note came to be taken in that form, although they may not have had actual notice of how the note was procured; they should not be allowed to exclude a meritorious defense, without showing that they took the note before it came to maturity, and paid value for it.'

"Upon these citations the statement in the form of a semble, quoted from Parsons, is made. Obviously they do not sustain the proposition so doubtfully stated by the learned author.

"Our adversaries also cite *Watson* v. *Russell*, 3 Best and Smith (113 Eng. Com. Law), 34. The case grew out of a check, drawn by the plaintiff in favor of the defendant, in payment of the hire of a ship, which the defendant had chartered to one Keys, and Keys had sublet to plaintiff. The plaintiff had given the check to Keys, but on the terms that he was to inform the defendant it was given in consideration that the ship should make the contemplated voyage. Keys delivered the check to the

defendant without mentioning this circumstance. The defendant having stopped the ship from going on the contemplated voyage, the plaintiff sued to recover the money which the defendant had received upon the check. The case contains expressions by both the judges delivering the opinions, who did not agree in the conclusion reached, that tend to support the doctrine claimed by the appellee's counsel. Manifestly these expressions were *obiter*. The case was appealed to the Exchequer Chamber, 5 B. & S. 958, and was there argued upon the ground that Keys was only an agent, and exceeded his powers in making delivery of the check But the judgment of the court below was affirmed without discussion by the court.

"The case of *The Western Iron Co.* v. *Brown*, 63 Me. 139, is entirely similar in principle to the case of *Monroe* v. *Bordier* It was an action by the payee against the maker, upon a promissory note delivered by the maker to a third party, in consideration of his promise and agreement to build a machine for the maker of the note. The plaintiff paid value for the note to the party to whom it was thus delivered; and the court, upon the authority of *Monroe* v. *Bordier*, was of opinion that the plaintiff was entitled to recover.

"The proposition that the purchaser of a promissory note or bill of exchange, made payable to the order of a third party, to whom the purchaser intends to dispose of it, acquires a title, which will pass by the sale of the paper to such an innocent third party, does not rest upon any doctrine peculiar to negotiable instruments. It is a doctrine of frequent application to the sale of chattels, that where there is a contract of sale and a delivery of the property to the vendee, even if it be procured by fraudulent device, that the title of the property nevertheless vests in the vendee; and if he sells it to an innocent third party for a valuable consideration, such a party will take it discharged from any claim of the original vendor.

"Mr. Benjamin, in his work on Sales, fourth American edition, secs. 648, 649, page 568, states the doctrine thus:

"'By the rules established in these cases, whenever goods are obtained from their owner by fraud, we must distinguish whether the facts show a *sale* to the party guilty of the fraud, or a mere delivery of the goods into his *possession*, induced by fraudulent devices on his part. In other words, we must ask whether the owner intended to transfer both the property in, and the possession of, the goods to the person guilty of the fraud, or to deliver nothing more than the bare possession. In the former case, there is a contract of sale, however fraudulent the device, and the property passes; but not in the latter case.

"'In the former case, the contract is *voidable* at the election of the vendor, not void *ab initio*. It follows, therefore, that the vendor may affirm and enforce it, or may rescind it. He may sue in *assumpsit* for the price, and this affirms the contract; or he may sue in *trover* for the goods or their value, and this disaffirms it. But in the mean time, and until he elects, *if his vendee transfer the goods, in whole or in part, whether the transfer be of the general or of a special property in them, to an innocent third person for a valuable consideration, the rights of the original vendor will be subordinate to those of such innocent third person.* If, on the contrary, the intention of the vendor was not to pass the property, but merely to part with the *possession* of the goods, there is no *sale*, and he who obtains such *possession* by fraud can convey no property in them to any third person, however innocent, for no property has passed to himself from the true owner.'

"This doctrine fully accounts for the decision in the case of *Munroe* v. *Bordier*, and cases of like import, without resort to any principle of law peculiarly applicable to negotiable instruments. In the sense of this doctrine, one may be an innocent purchaser, or a *bona fide* purchaser, of commercial paper, although he is not a *bona fide* holder for value in the sense in which that expression is used in its application to negotiable paper.

"The doctrine of negotiability, as applied to commercial paper, which renders the title of the transferee for value, even if he acquires from one who has stolen the paper, or obtained the

possession of it by fraud, a valid title, is a technical doctrine, applicable only to a transfer by indorsement of paper drawn payable to order, or by delivery, where it is made payable to bearer.

"The whole doctrine of *bona fide* holder, as applied to negotiable instruments, rests upon this mode of negotiation or transfer which is peculiar to commercial paper. The very definition of negotiable instruments, and of the 'negotiation,' whereby a holder may acquire title and be enabled to maintain a suit in his own name, in the statutes of Ohio R. S., secs. 3171, 3172, imports this. A party may acquire a negotiable instrument, as he may acquire any other chattel, by transfer or assignment, and he may be an innocent purchaser of it in the same sense that he may be of any other chattel. That is to say, if his vendor has a title to it, the purchaser may acquire his title; and if it be under such circumstances as would exclude the claim of a prior owner to any other chattel, or to a non-negotiable chose in action, it will in like manner exclude such claim to a negotiable instrument. A transfer of a draft, or negotiable note, made payable to order, by delivery, without indorsement, does not clothe the assignee with the rights of an indorsee of a negotiable instrument. It gives him the title, but subject to the rules applicable in the case of an assignment of any other chattel or chose in action.

"The statement of this doctrine is most clearly enunciated by the Supreme Court in the case of the *Trust Company* v. *National Bank*, 101 U. S. 68. The plaintiff, the Trust Company, was the holder for value before maturity of a promissory note drawn by the First National Bank of Wyandotte, Kan., to the order of the Cook County National Bank of Chicago. As between the maker and the payee, there existed a valid defense to this note at the time of its transfer to the Trust Company, by whom it was discounted without any knowledge of any such defense. But the transfer was by parol, accompanied by a guaranty, written on the

back of the paper, of the payment of the note at its maturity by the Cook County Bank, the original payee. The Supreme Court, in deciding that the plaintiff held it subject to the equities between the payee and the maker, say:

"'The note was not indorsed to the Trust Company, and it was not, therefore, taken in the usual course of business by that mode of transfer in which negotiable paper is usually transferred. . . . In no commercial sense is this (guarantee) an indorsement, and probably it was not intended as such. . . . And if it could be treated as an assignment of the note, it would not cut off the defenses of the maker. Such an effect results only from a *transfer according to the law-merchant; that is, from an indorsement.* An assignee stands in the place of his assignor, and takes simply an assignor's rights; but an indorsement creates a new and collateral contract.'

"There is scarcely a limit to the authorities of this character that might be cited to the court, but this recent decision by the Supreme Court of the United States seems to us to be sufficient.

"We refer the court, in illustration of the doctrine, in its application to a transfer by a third party to the original payee of a negotiable instrument made payable to the payee's order, to—

Vorce v. *Rosenberg*, 12 Neb. 448.
Chariton Plow Co. v. *Davidson*, 16 Neb. 377.
Aldrich v. *Stockwell*, 9 Allen (91 Mass.) 45.

"If Wilshire, as a remitter or otherwise, had purchased the draft in question in this case of the Fidelity National Bank — if it had been delivered to him by the Fidelity National Bank for the purpose of passing title to the draft to him, or under such circumstances that a title vested in him, by whatever fraudulent device he might have procured its delivery—the case would have been quite different. It might then have fallen within the doctrine of *Munroe* v. *Bordier*, or some of the cases founded upon that decision, and might have necessitated an examination of the

correctness of the doctrine there laid down. It was not delivered to him by the Fidelity National Bank as a purchaser, or with any purpose of conferring a title upon him. It was not drawn in any such form as that its possession by him carried any *indicia* of ownership with it. As has been said, if he had asserted title to it, or claimed to own it, it would have been, upon the facts disclosed in this evidence, clear that he acquired it as an accomplice in an embezzlement of it from the Fidelity Bank.

"It would be a doctrine fraught with great danger, and with no other compensating convenience to the commercial community, that a thief could transfer a title to paper that was not negotiable, in his hands. Such a result, in the language of the Supreme Court, can arise 'only from a transfer according to the law-merchant; that is, from an indorsement.'

"It is in vain, therefore, for the appellee to claim that it is in the position of an indorsee for value to this draft. There has been no indorsement of the draft, and by the very form in which it was drawn it was impossible for the appellee to become an indorsee of it for value.

III.

"But the appellee is not a purchaser of this draft No. 16,412, involved in this case for value, and we desire to present to the court the evidence upon this subject.

"At the time when this draft was left with the appellee a deposit slip was made out by Mr. Robert M. Orr, the assistant cashier of the Exchange Bank, as follows (Rec.):

'AMERICAN EXCHANGE NATIONAL BANK, CHICAGO.

Deposited for account of C. J. Kershaw & Co., June 15, 1887.

Check and drafts on other towns and cities:

Cincinnati	200,000
" N. Y.....	100,000
*Fidelity.....	100,000
	400,000
	800
	$399,200

* Credited subject to advice from the Fidelity Nat. that draft is for Kershaw account. We have wired for advice.'

"This item, Fidelity $100,000, thus conditionally credited, subject to advice from the Fidelity National Bank that the draft was for Kershaw's account, is the draft No. 16,412 in question in this case.

"It is true, as learned counsel for appellee have claimed, that Wilshire testifies that he was shown a deposit slip by the cashier that did not contain this condition in reference to this draft. And, as is explained by the testimony of Mr. Orr (Rec.), this was the only deposit slip that was made; and upon observing the fact that this draft was drawn to the order of the American Exchange Bank, while Kershaw was yet in the bank, and before any credit had been made, this addenda was made to it. And the entry as it was ultimately carried into the books of the appellee, according to our recollection, was that this condition, as it appears upon the deposit slip, was embodied as a part of the entry.

"We now call the attention of the court to the testimony of A. L. Dewar, cashier of the Exchange Bank, with whom the transaction took place. It will be necessary for the court to read the whole of his evidence to fully appreciate its bearing upon this question. We extract from his testimony the material statements, as follows:

"It was commenced by reference to Exhibit No. 100 (Rec. ——), made at the time of the transaction by Mr. Dewar, in which this $100,000 was deducted from the total amount of the credit on account of the so-called certificate of deposit, the draft to the order of Kershaw & Co., and the draft in question. Mr. Dewar testified as follows:

'Q. What do you mean, Mr. Dewar, when you say that the $300,000 represents the same thing as the $400,000, less one of the drafts for $100,000? Explain why in making those figures one of the drafts was deducted.

'A. When I handed the paper to Mr. Orr, he called my attention to the fact that one of the drafts was made payable direct to our order, and we considered it advisable to telegraph to the Fidelity National Bank.

'Q. In reference to that draft?

'A. In reference to that $100,000 draft.

'Q. Meanwhile, what, if any thing, did you and Mr. Orr say to Kershaw & Co. in reference to that particular draft?

'A. I do n't know what Mr. Orr said.

'Q. Did you say any thing?

'A. I simply told Mr. Kershaw, calling his attention to those figures, that we would wait advices from the Fidelity National Bank.

'Q. In reference to this particular draft?

'A. In reference to the $100,000 draft.'——(Record,)

'Q. Will you state, Mr. Dewar, exactly what the bank did from the time that you took those papers from your brother up to the time that they were placed to the credit of the account of C. J. Kershaw & Co.?

'A. We telegraphed New York; we telegraphed Cincinnati.

'Q. Telegrams have been introduced in evidence and made exhibits to the deposition of Mr. Orr, showing that you telegraphed New York to ascertain whether the drafts would be paid by the Chemical National Bank of New York when presented, and that you telegraphed the Fidelity National Bank of Cincinnati in reference to the one draft of $100,000 made payable to the order of the American Exchange Bank; those telegrams are attached to Mr. Orr's deposition as exhibits 36, 37, 72, and 73. I read them to you. [Counsel reads telegrams.] . . Having now read the exhibits to you, will you please state whether those are the telegrams to which you referred in your previous answer?

'A. Yes, sir; they are.

'Q. Will you now please state what the American Exchange Bank did, if any thing, in reference to those two drafts and the letter of advice while awaiting replies to those telegrams?

'A. The American Exchange National Bank commenced to pay the checks of Kershaw & Co. at 10 o'clock sharp against those drafts and letter of advice, and we paid steadily up to the time of the presentation of the $200,000 check for the clearing house; then we stopped.

'Q. While you were paying checks where were the drafts and the letter of advice?

'A. They were in the hand of the assistant, Mr. Orr.

'Q. That is, the assistant cashier?

'A. Yes, sir.

'Q. Had they been entered upon the books of the bank?

'A. No, sir; I think not.

'Q. Had there been any arrangement or agreement in reference to them with C. J. Kershaw & Co., except such as you have already stated, in reference to the one draft of $100,000?

'A. No, sir.

'Q. Did Kershaw & Co. know, so far as you know, that the bank was telegraphing in reference to any of this paper except in reference to the one draft of $100,000 made to the order of the bank?

'A. I think they did, sir.

'Q. Did they know whether or not the deposit had been placed to their credit?

'A. They could not have known.

'Q. As to the fact, simply, did they know?

'A. They did not know it had been placed to their credit.' ——— (Record,)

'Q. You say that the papers were taken out, and they were passed around the table, if I understand you?

'A. Yes, sir.

'Q. You examined them?

'A. Yes, sir.

'Q. One of them, if I understand you, was a draft of the Fidelity National Bank to the order of the American Exchange Bank for $100,000?

'A. Yes, sir.

'Q. Did you discover that fact at that time?

'A. I don't think I did; I am sure I did not.

'Q. You discovered it before any of the parties left, if I understand you?

'A. Yes, sir.' ——— (Record,)

'Q. How came you to telegraph to the Fidelity National Bank about it?

'A. That was done as an extra precaution.

'Q. How happened it you did not ask the parties who brought it any thing about it, if it was worth telegraphing about.

'A. It is customary, in receiving such deposits from a customer, simply to pass upon the items and hand them to a clerk, and he called my attention to this after I handed it to him. We did not recognize Wilshire & Co. in the matter, and I know that Kershaw & Co. — their attention had been called to it.'——— (Record,)

'Q. Were those papers delivered to your bank as collateral security?

'A. We accepted these papers from Kershaw & Co., and held them as such pending answers to telegrams which we had sent to New York and Cincinnati.

'Q. When you say you accepted them as such, you mean you accepted them as collateral security pending the sending of those telegrams and the getting of the answers, do you?

'A. We accepted them and considered them as collateral.

'Q. You state that your understanding or consideration was that you held them as collateral security pending the replies or answers to telegrams you sent to Cincinnati and New York; is that correct?

'A. I did not make that statement, Mr. Kittredge.

'Q. Is that true?

'A. We simply held them as security against checks which Kershaw & Co. understood we were to pay until we should receive a reply from New York or Cincinnati.

'Q. Was there any thing said to that effect?

'A. There was nothing particular said; the draft and the letter of credit were simply handed to me by my brother, *and he went away with the understanding that I was to pay checks to the extent of* $218,000. I do n't remember any thing particular being said.'———(Record,)

'Q. Have you testified as a witness in the case of James F. Hill against C. J. Kershaw and others?

'A. I believe that I have,

'Q. Before H. W. Bishop?

'A. Yes, sir.

'Q. During the present year?

'A. Yes, sir.

'Q. Commencing your testimony in the latter part of February, did you testify before him?

'A. Yes, sir.

'Q. Did you testify in answer to the qustion "Was that $200,000"—referring to the $200,000 represented by the two drafts—"received on the 15th for collection, or passed to the credit of Kershaw & Co.," and did you answer, "It was received as collateral security for Kershaw & Co.," or words to that effect?

'A. I think Mr. Manning asked me to give him a statement in regard to the amount of collaterals we held on such and such dates, and I gave it to him, among which were these papers.

'Q. Was the question just read to you asked you, and did you not answer it just as I have read it?

'A. It seems to me that I did.

'Q. Were you asked the further question, referring to the letter of advice or certificate of deposit, as it is called, for $200,000, from the Fidelity Bank, "Did your bank receive that on deposit or as collateral security"? and did you answer, "We received that with the rest as collateral security"?

'A. I believe I did. What I wanted to convey to Mr. Manning was simply this, that we had not received that as an actual deposit at that time; that we simply held that paper, and the understanding Kershaw had with us—he went away being assured we would pay his $218,000 checks. As regards any promises or arrangements made by this bank, we had made none; there was no reason for any.

'Q. I ask you again was n't that paper received as collateral security by the bank?

'A. Was it received as collateral security by the bank?

'Q. Was n't that your understanding of it at that time?

'A. No, sir.

'Q. How did you understand the bank received it?

'A. I have stated that, Mr. Kittredge. I simply state it this way: this paper was handed to me by my brother, and to all intents and purposes he understood I would pay his checks through the clearings when he delivered that paper to me. I did not say I would pay it, nor did I not say what I would pay or how much I would pay, what checks I would pay, or what I would do with the paper, and I held the paper there. It might be considered as collateral security, or whatever you choose to call it. I simply held the paper there until we had received advices from New York and Cincinnati. We commenced immediately to pay the checks at 10 o'clock. We paid more than Kershaw understood we should pay, and when this $200,000 check was presented

we stopped paying; and to the best of my knowledge the drafts were then, before we received any telegram from New York or Cincinnati, placed to the credit of C. J. Kershaw & Co.—the two $100,000 drafts and the $200,000 certificate of deposit. That is all the explanation I can make, and all the explanation I want to make in reference to it.

'Q. They were placed to the credit of C. J. Kershaw & Co. without any thing further transpiring between you and them after the parties left the bank in the morning, were they not?

'A. There was a discussion with reference to that $100,000 draft.

'Q. Before they left?

'A. Before they left.

'Q. After the discussion, and after they left the paper, as you stated in your answer just given, you held the paper until after you had concluded to dishonor further checks of Kershaw & Co., and then placed this amount to their credit without further consultation or conversation with any one, did you?

'A. I think that is about it.'———(Record,)

"Upon this testimony, it is clear that the appellee bank received this draft No. 16,412 subject to the direction of the Fidelity Bank as to what should be done with it, and credited it to Kershaw & Co. only upon condition that the Fidelity Bank should ratify such an application of it. They received the telegram of the Fidelity Bank. (Exhibit 37, Rec.) It is complained that we stated in our original brief that this was 'at or about noon;' and that the statement was inaccurate, in that the original telegram itself bears evidence that it was received at Chicago at one o'clock P. M. We had not the original telegram before us in making this statement, and we accept the correction. When the Exchange Bank received it, it is perfectly clear that they recognized that the Fidelity Bank had a right to direct, as it did, that this draft should be placed to the credit of its own account with the appellee bank. I say this is perfectly clear. It is made so by the telegram of the appellee bank to Joseph Wilshire on June 16th (Rec.), which disclosed that the Fidelity Bank accompanied its telegram of the 16th of June by a letter,

which is printed (Rec.), affirming the telegraphic advice directing this draft to be so credited to its own account. The telegram is as follows:

"'JOSEPH WILSHIRE, CINCINNATI, OHIO:

'Fidelity advises us this morning, by letter, that they have charged to our account New York exchange for one hundred thousand, payable to our order *and left with us by you* yesterday; this must be reversed and Chemical instructed to wire us they will pay same. Also Fidelity Bank wire us direct that they have reversed the charge and authorize us to use this item for Kershaw; otherwise you must deposit four hundred thousand instead of three hundred thousand in the bank we have already designated. Rush. AMERICAN EXCHANGE NATIONAL BANK.'

"This telegram shows that the Exchange Bank, unwillingly and reluctantly, yet, nevertheless, recognizes the right of the Fidelity Bank to require this draft to be placed to its own credit, and it shows also that they had no theory at that time that they received this draft from Kershaw & Co., and did not recognize Wilshire, Eckert & Co. in the matter. It was 'left with us by you [Wilshire] yesterday,' was the language of this dispatch.

"In view of this testimony, with what boldness can the American Exchange Bank claim that it acquired this draft by purchase from either Kershaw & Co., or Joseph Wilshire, as the unconditional owner of it, for value, by agreeing to place, and by placing a conditional credit of the amount of it to Kershaw & Co.'s account?"

For these reasons I claim that the judgment of the Circuit Court is erroneous, and should be reversed.

JOHN W. HERRON,
Counsel for Appellant.

Office Supreme Court U. S.
FILED.
JAN 10 1890
JAMES H. MCKENNEY
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

Nos. 1110 and 1111.

DAVID ARMSTRONG, RECEIVER OF THE FIDELITY NATIONAL BANK OF CINCINNATI, OHIO,
Appellant,
vs.
THE AMERICAN EXCHANGE NATIONAL BANK OF CHICAGO,
Appellee.

SAME.
vs.
SAME.

In Equity.

Appeals from Circuit Court of the United States for the Southern District of Ohio, Western Division.

BRIEF FOR APPELLEE.

W. H. SWIFT,
FOR APPELLEE.

C. B. MATTHEWS,
OF COUNSEL.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

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SAME
vs.
SAME.

In Equity.

Appeals from the Circuit Court of the United States for the Southern District of Ohio, Western Division.

STATEMENT OF CASES.

These cases were heard and decided by Judges Jackson and Sage, sitting together at Cincinnati, in the Circuit Court of the United States, for the Southern District of Ohio, Western Division.

The decision of the court was rendered by Jackson, J. No written opinion was delivered or has since been filed.

The Fidelity National Bank was a corporation organized under the National Bank Act, and located at Cincinnati, Ohio, where it continued to do a banking business until June 21, 1887, when it closed its doors and passed

into the charge of the comptroller of the currency, who upon June 27, 1887, appointed appellant receiver. The comptroller also commenced proceedings against the bank, which resulted in a decree, July 12, 1887, adjudging its dissolution and the forfeiture of its charter.

At the time of the suspension of the bank appellee held claims against it amounting to four hundred thousand (400,000) dollars, which were duly presented to the receiver upon September 24, 1887. He refused to allow them, and upon February 2, 1888, appellee filed its three bills in equity against the receiver, praying that its several claims be allowed against the assets of the bank in the hands of said receiver, and that he be ordered to pay dividends thereon in due course of administration as upon other claims duly allowed.

The first suit (Appeal, No. 1,110) was brought to enforce the allowance of a bill of exchange for one hundred thousand (100,000) dollars, drawn by the Fidelity National Bank upon the Chemical National Bank of New York, to the order of appellee, as follows:

"THE FIDELITY NATIONAL BANK.

"$100,000.00. No. 16,412.

"CINCINNATI, June 14, 1887.

"Pay to the order of American Exchge. Nat. Bk., of "Chicago, One Hundred Thousand Dollars.

"To the Chemical National Bank, New York City. } BENJ. E. HOPKINS, *As. Cas.*"

This bill of exchange was deposited with appellee by one of its regular customers, C. J. Kershaw & Co., upon June 15, 1887, and was then endorsed by them for deposit, as follows:

"Dep. Acct., C. J. KERSHAW & Co.
"C. J. KERSHAW & Co."

Upon the same day appellee endorsed this bill over to the American Exchange National Bank of New York for collection and sent it forward. It was duly presented to the Chemical National Bank, June 17, 1887, and payment was refused, and the bill was duly protested and returned to appellee, and notice of protest was duly given to the drawer.

The defense to this claim is set up in the following paragraph, which we take from appellant's answer to our bill.

"And this defendant further answering denies that the complainant is the owner of said draft or bill of exchange, but on the contrary the defendant avers the fact to be, that the said draft or bill of exchange was signed by the said Benjamin E. Hopkins and came into the possession of the complainant without any consideration whatever therefor, paid by the complainant to the said The Fidelity National Bank; that the said The Fidelity National Bank never at any time received any consideration from any person whomsoever for the said draft or bill of exchange in said complainant's bill set forth and is not, and never has been, indebted to the complainant on account thereof." (Rec., 14.)

A second suit was brought to enforce the allowance of a certain other bill of exchange for one hundred thousand (100,000) dollars, drawn by the Fidelity National Bank upon the Chemical National Bank of New York to the order of C. J. Kershaw & Co., as follows:

"THE FIDELITY NATIONAL BANK.

"$100,000.00. No. 16413.

"CINCINNATI, June 14, 1887.

"Pay to the order of C. J. Kershaw & Co., one hun-
"dred thousand dollars.

"BENJ. E. HOPKINS,

"*As. Cas.*

"To the Chemical National Bank,
New York City."

This bill was also deposited with appellee by C. J. Kershaw & Co., upon June 15, 1887, having been first endorsed by them as follows:

"For deposit,

"C. J. KERSHAW & Co."

And upon the same day appellee endorsed the same over to the American Exchange National Bank of New York, for collection, and sent it forward.

This bill was likewise duly presented to the drawee for payment, and, payment having been refused, was duly protested and returned to appellee and notice of protest was likewise duly given to the drawer.

The Circuit court rendered a decree in this suit for the full amount claimed and no appeal has been prayed. The case is mentioned here only for the purpose of making the further statement of facts intelligible.

A third suit (appeal No. 1111), was brought upon a certain certificate of deposit, issued by the Fidelity National Bank upon June 14, 1887, and delivered to the appellee June 15, 1887, in the manner hereinafter stated.

It was written on one of the letter-heads of the bank in the following words and figures, the written parts being italicized by us.

" Briggs Swift, President. Ammi Baldwin, Cashier.
E. L. Harper, Vice-President. Benj. E. Hopkins, Ass't Cashier.
U. S. Depository — The Fidelity National Bank.
Capital, $2,000,000.00. Surplus, $400,000.00.

CINCINNATI, *June 14th, 1887.*

The American Exchange National Bank, Chicago, Illinois.

Gentlemen: Mess. Wilshire. Eckert & Co. have deposited two hundred thousand ($200,000.00) dollars to your credit for the use of C. J. Kershaw & Co.

Respectfully yours,

Benj. E. Hopkins,
As. Cas."

Appellee presented this certificate of deposit to the Fidelity National Bank, June 18, 1887, and demanded payment, which was refused.

The material parts of appellant's answer to this suit are as follows:

"And this defendant alleges that one, Joseph Wilshire, was a member of the firm of said Wilshire, Eckert & Co., and the said E. L. Harper, and the said Benjamin E. Hopkins, and the said Joseph Wilshire combined together and conspired to defraud said Fidelity National Bank; and defendant avers that the said E. L. Harper, Benjamin E. Hopkins and Joseph Wilshire with other persons to this defendant unknown, were, at and before the said 14th day of June, A. D. 1887, engaged in what is called "a deal" in wheat, which is speculating in wheat, in the City of Chicago, Illinois, by buying very large amounts of wheat upon payment of a margin or percentage of the purchase price thereof, and by entering into contracts for the future delivery to them of wheat in large quantities, upon which contracts they were advancing and paying a margin or part of the price of said wheat; the object of said speculation and purchase under said contracts being to enable the said parties to own and control all the wheat then in the City of Chicago, or to arrive in said city within the time of the performance of said contracts, and thereby to create what is called a corner in the market, that is to say, by contracting for the purchase and delivery of more wheat than exists and than can by any possibility be delivered, to create a fictitious value or price thereof and to effect an advance in the market price of wheat in Chicago, and to realize thereon a profit to the said E. L. Harper, Benjamin E. Hopkins and Joseph Wilshire, and such other persons as might be engaged with them in said speculation or deal.

This defendant says that the said E. L. Harper, Benjamin E. Hopkins and Joseph Wilshire conspired together unlawfully to abstract from the said Fidelity National Bank, the money of said bank, and to embezzle its funds in the possession or control of the said Harper and Hopkins as officers of said bank and by drawing bills of exchange and other evidences of indebtedness in the name of said bank, to use its credit and resources for their own use and benefit, not in the prosecution of the legitimate business of the bank, but in the purchase of wheat in the City of Chicago, and in contracts for the future delivery of wheat in the prosecution of said unlawful deal or speculation.

And this defendant avers that the letter of advice addressed to the complainant in his bill set forth, was signed by the said Benjamin E. Hopkins and delivered by the said E. L. Harper

to the said Joseph Wilshire, of the firm of Wilshire, Eckert & Co., in the execution of said scheme to abstract and embezzle the funds of said Fidelity National Bank, and unlawfully to use its credit in the said speculation in wheat, and for no other purpose; and that the said Wilshire, Eckert & Co. did not deposit the sum of two hundred thousand dollars, nor any part of said sum, in said letter of advice mentioned, in the said Fidelity National Bank, to the credit of the complainant, for the use therein expressed; but, on the contrary, defendant avers that the said letter was unlawfully and fraudulently addressed to the complainant, when in truth and in fact no sum of money had been deposited by any person to the credit of the complainant with said Fidelity National Bank, in the execution of the scheme of fraudulently abstracting and embezzling the funds of the said Fidelity National Bank and unlawfully using its credit for the deal or speculation in wheat in Chicago, as hereinbefore set forth. And this defendant says that at the time of the alleged delivery of the said letter of advice to the complainant, it had, by its officers and agents, knowledge and notice that the said E. L. Harper, Benjamin E. Hopkins and Joseph Wilshire were engaged in such deal or speculation in wheat in the manner aforesaid, in the city of Chicago, and were unlawfully using the funds and resources and credit of the said The Fidelity National Bank for such purpose; and that the said letter of advice was written and signed for the purpose aforesaid, and was delivered to the said Joseph Wilshire and by him to the said complainant to be used by and through the said complainant, and by the said C. J. Kershaw & Co., who were, and were well known to the complainant to be, brokers engaged in the purchase of wheat in said deal or speculation for the account of said Wilshire and his confederates, and with the full knowledge that the purchases were in the execution of an unlawful combination to control the market for wheat, and thereby enhance the value thereof in the city of Chicago at the time when they received the said letter of advice.

This defendant further answering says, that he does not know, and therefore cannot state, the precise terms of the agreement between the said Joseph Wilshire, representing the said firm of Wilshire, Eckert & Co., and his confederates in said unlawful undertaking, under which the said letter of advice was delivered by the said Joseph Wilshire to the complainant, but the defendant says that the terms of said agreement and the circumstances connected with said agreement were such, that the complainant was put upon inquiry and could not, and did not, *bona fide* make advances to said C. J. Kershaw & Co., nor become entitled to receive from said Fidelity National Bank the amount of such advances or any part thereof; and any such advances, if made by complainant, were not made in the regular

course of business, but were made in bad faith, and with notice of the facts as herein alleged; and the defendant says that the said Fidelity National Bank did not become by reason of said advances indebted to the complainant in the sum of two hundred thousand dollars as aforesaid, nor any part thereof."

In the first suit (Appeal No. 1,110) appellee asked that its claim be allowed for one hundred thousand ($100,000) dollars, with interest at the rate of six per cent. per annum from June 17, 1887, the day upon which the bill of exchange was presented to the drawee, to June 27, 1887, the day upon which the receiver was appointed.

In the third suit (Appeal No. 1,111) appellee asked that its claim be allowed upon the certificate of deposit for the sum of one hundred ninety-eight thousand six hundred ninety-seven dollars and twenty-three cents ($198,697.23) with interest at the rate of six per cent. per annum from June 18, 1887, the day upon which payment of the certificate of deposit was demanded, to June 27, 1887, the day upon which the receiver was appointed.

The American Exchange and Fidelity banks were regular correspondents, and made collections for each other, and upon June 18, 1887, appellee owed the Fidelity, on account of collections, the sum of thirteen hundred and two dollars and seventy-seven cents ($1,302.77), which, being credited upon the certificate of deposit, left the sum of one hundred ninety-eight thousand six hundred ninety-seven dollars and twenty-three cents ($198,-697.23) due, the amount claimed on the certificate of deposit. The receiver had paid one dividend of twenty-five per cent., October 31, 1887, upon all claims proved and allowed (Rec., 192), and as appellee had prior to that time presented its claims, it asked that the receiver, in pay-

ing its claims, be ordered to pay interest upon the amount of this withheld dividend at the rate of six per cent. per annum from October 31, 1887.

The right of appellee to interest upon the withheld dividends is one of the questions of law presented by these appeals.

C. J. Kershaw & Co. who deposited with appellee the paper in suit, was a copartnership composed of Charles J. Kershaw and Hamilton Dewar as general partners and Charles B. Eggleston as special partner. The firm was engaged in the grain commission business upon the board of trade in Chicago, and kept its bank account solely with appellee. Some time in March, 1887, or prior thereto, they began to make purchases of wheat upon orders from Wilshire, Eckert & Co., who were commission men in Cincinnati. They were also buying wheat for J. W. Hoyt, of Cincinnati, another commission man. They did not know the principals for whom Hoyt and Wilshire were acting, and never could find out who they were, although they made repeated efforts so to do, (Rec., 127, 266) and they did not know until the 30th of May that Hoyt and Wilshire were acting for the same principal.

It was the custom of Wilshire, Eckert & Co. to transfer money to C. J. Kershaw & Co. for these purchases as follows: they advised C. J. Kershaw & Co. that they had deposited in bank in Cincinnati a certain sum to their credit. C. J. Kershaw & Co. then drew a draft against such deposit and deposited the same to their own credit with appellee. Wilshire says that C. J. Kershaw & Co. themselves selected the Fidelity as the bank in which they wanted the funds deposited. (Rec., 95.) After the two banks became correspondents, money was also transmitted by certificates of deposit similar to the

one in suit, and prior to the 15th of June, the Fidelity had issued and sent to the American Exchange four such certificates of deposit. These were upon printed forms, and read as follows, the written portions being italicized by us. (Rec., 46–7.)

"The Fidelity National Bank.

"CINCINNATI, *April 28*, 1887.

"*A. L. Dewar*, Esq., Cashier *American Exchg. Nat., Chicago, Ill.*

"DEAR SIR: We credit your account *twenty-five thousand* dollars, received from *Wilshire, Eckert & Co.*, for the use of *C. J. Kershaw & Co.*

"Respectfully yours,

"*$25,000.* *Ammi Baldwin*, Cashier."

On the margin: "Letter of Advice."

Written across the face: "*Same telegraphed this date.*"

"The Fidelity National Bank.

"CINCINNATI, *Apl. 28th*, 1887.

"*A. L. Dewar*, Esq., Cashier *American Ex. Natl. Bk., Chicago, Ill.*

"DEAR SIR: We credit your account *one hundred & three thousand* dollars, received from *C. J. Kershaw & Co., $50,000 wired, $53,000 wired* for the use of *C. J. Kershaw & Co.*

"Respectfully yours,

"*$103,000.00.* *E. L. Harper, V. P.*"

On the margin: "Letter of Advice."

"The Fidelity National Bank.

"CINCINNATI, *April 29th*, 1887.

"*A. L. Dewar*, Esq., Cashier *American Exchg. Nat. Bk., Chicago*, Ills.

"DEAR SIR: We credit your account *twenty-five thousand* dollars, received from *Wilshire, Eckert & Co.*, for the use of *C. J. Kershaw & Co.*

"Respectfully yours.

"*$25,000.* *Ammi Baldwin*, Cashier."

On the margin: "Letter of Advice."

Written across the face: "*Same telegraphed you this date under our special telegraphic code.*"

"The Fidelity National Bank.

"CINCINNATI, *April 30th*, 1887.

"*A. L. Dewar*, Esq., Cashier, *Chicago, Ills.*

"DEAR SIR: We credit your account *one hundred thousand* dollars, received from *Wilshire, Eckert & Co.*, for the use of *C. J. Kershaw & Co.*

"Respectfully yours.

"*$100,000.* *Ammi Baldwin*, Cashier."

On the margin: "Letter of Advice."

Written across the face: "*Same telegraphed you this date.*"

These certificates were issued for five different deposits made with the Fidelity to the credit of the American Exchange, for the use of C. J. Kershaw & Co. The Fidelity sent the American Exchange a telegram announcing each of these deposits. These telegrams are as follows (Rec., 48):

"CINCINNATI, O., 28.

Am. Ex. Nat. Bk.

Wilshire, Eckert & Co. deposit with us for your credit, use C. J. Kershaw & Co., twenty-five thousand dollars.

FIDELITY N. BANK."

"CINCINNATI, O., 4—28.

American Ex. Nat. Bank.

Kershaw & Co. have placed to your credit fifty thousand dollars.

FIDELITY NAT. BANK."

"CINCINNATI, O., 28.

American Ex. Nat. Bank.

Kershaw & Co. have placed to your credit fifty-three thousand additional.

FIDELITY NAT. BANK."

"CINCINNATI, O., 29.

Am. Ex. Nat. Bk.

Wilshire, Eckert & Co. deposit to your credit for the use of C. J. Kershaw & Co., $25,000.

FIDELITY N. BANK."

"CINCINNATI, O., 30.
American Exchange Natl. Bank, Chicago.
Wilshire, Eckert & Co. deposit to your credit for the use of C. J. Kershaw & Co., $100,000.
FIDELITY NATL. BANK."

Upon May 2d the Fidelity sent a further telegram to the American Exchange advising it that Wilshire, Eckert & Co. had deposited with the former bank to the credit of the latter, for the use of C. J. Kershaw & Co., the further sum of one hundred thousand dollars. (Rec., 50.)

The Fidelity had therefore advised the American Exchange prior to June 15th, that it had received six different deposits to the credit of the latter bank for the use of C. J. Kershaw & Co., to the amount in the aggregate of three hundred and fifty-three thousand (353,000) dollars, and that four of these deposits, amounting to two hundred and fifty thousand (250,000) dollars had been made by Wilshire, Eckert & Co.

It was the custom of the American Exchange upon receipt of these certificates of deposit to place the amount of the same to the credit of C. J. Kershaw & Co., and allow them to check against the same as deposits of money (Rec., 322), and the four certificates were all promptly paid by the Fidelity in due course of business.

It was also the custom of the appellee to place at once to the credit of Kershaw & Co., as cash items, any drafts which they drew upon Cincinnati and deposited with the American Exchange. (Rec., 406.)

The firm of C. J. Kershaw & Co. kept a regular and ordinary mercantile account with the American Exchange, and were considerable borrowers.

The state of C. J. Kershaw & Co.'s account with ap-

pellee upon the morning of June 14th, was as follows: The firm owed the American Exchange $380,378.37 overdraft, and $280,000 in notes, against which the bank held as collateral security 692,688 bushels of wheat, and 5,000 bushels of corn, also certain wheat then being loaded for shipment. The total value of this security in the morning was $736,000, and the total indebtedness of Kershaw & Co. to appellee was $660,378.

During the day (June 14, 1887) there was a panic in wheat, and the price fell from 92 cents to 74¾ cents per bushel. The bank's security fell in value at a corresponding rate, and at 1 o'clock was worth only $544,894, and Kershaw & Co. still owed $525,477.01, viz: $280,000 in notes and $245,477.01 overdraft. (Rec., 44–5.) Thereupon the bank stopped payment of the checks of C. J. Kershaw & Co. The amount of all the checks refused was about $60,000.

The state of the account between the two banks upon the 14th of June was as follows: The Fidelity owed the American Exchange a balance of something over $100,000, consisting in part of a draft drawn by Wilshire, Eckert & Co., to the order of C. J. Kershaw & Co., upon the 13th, and deposited by the latter firm with the American Exchange on that day.

The American Exchange, in accordance with its custom, had treated this draft as a cash item and honored the checks of C. J. Kershaw & Co. against it, upon the 14th. Upon the night of the 13th this draft had been sent by the American Exchange to the Fidelity for payment, and upon the 14th the latter bank telegraphed the former that it was paid. Payment was made by placing the amount to the credit of the American Exchange on the books of the Fidelity bank. (Rec., 51–3, 56.)

Thereupon and upon the same day, June 14th, the American Exchange telegraphed the Fidelity, "Remit "at once, hundred thousand clearing house currency or "gold," (Rec., 52), to which it received in reply the next morning, June 15th, $50,000 in currency by express, and a draft for $50,000 drawn by the Fidelity on the Chemical National Bank of New York, which was duly paid by the drawee on presentation.

At the close of business upon the 14th of June, the American Exchange was in no complications with Kershaw & Co., or with the Fidelity Bank.

As to the former, it had security enough to make itself whole, and as to the latter, it had called for substantially the whole balance of account, and the same had been sent forward. There was, therefore, no inducement for the American Exchange to take any unusual risk in connection with the subsequent transactions which we are now about to relate.

The fact that appellee had stopped payment of Kershaw & Co.'s checks (June 14th) was doubtless at once telegraphed to Cincinnati (Kershaw says: "I tele- "graphed myself to Wilshire a good many times that "day," Rec., 252), for just after the bank had closed appellee received the following telegram.

"CINCINNATI, O., 6/14, 1887.

Am. Ex. Nat. Bank:

Joseph Wilshire will be at your bank to-morrow morning with six hundred thousand dollars to make his trade with Kershaw and others good if they are protected until he arrives. Fourteenth.

FIDELITY NAT. BANK."

The cashier of the bank sent for Kershaw & Co., showed them the telegram and told them the bank

wanted to do everything in its power to assist them, but could not agree to protect them in any shape, manner or form. (Rec., 312, 399.)

Kershaw & Co. replied in substance that if Wilshire came up from Cincinnati that night, as telegraphed, he would arrive at about 8 o'clock the next morning; that the bank had closed and would not open until 10 o'clock the next morning; that the board of trade had also closed and would not open until 9:30 o'clock the next morning, so that they really needed no protection for the time before Wilshire's arrival. (Rec., 313–14.)

Kershaw & Co. then suggested and dictated the following telegram which was sent by the cashier. (Rec., 399.)

"CHICAGO, 14 June, 1887.

Fidelity National Bank, Cincinnati, Ohio:

If Wilshire is here to-morrow morning with six hundred thousand currency the deal will be safe. Answer quick. (Rec., 53.)

AM. EXCH. NAT. BANK."

Two replies were received the same night, which read as follows (Rec., 53):

"CINCINNATI, Ohio, June 14, 1887.

"*American Exchange Natl. Bank:*

"Wilshire will be there on the morning train. (Rec., 53.)

FIDELITY NATL. BANK."

"CINCINNATI, Ohio, 6/14, 1887.

"*American Exchange National Bank, Chicago:*

"Have already wired you that he will be there with six hundred thousand in morning. (Rec., 53.)

FIDELITY NATL. BANK."

Kershaw & Co. also received one or more telegrams from Cincinnati that afternoon to the effect that $600,000 would be sent up to Chicago that night. (Rec., 254–5, 387.)

In accordance with the telegrams which the Fidelity bank had sent appellee on the night before, Wilshire arrived in Chicago on the morning of June 15th, and went to the American Exchange Bank where he had an interview with C. J. Kershaw, Hamilton Dewar and C. B. Eggleston, all the members of the firm of C. J. Kershaw & Co. Kershaw and Hamilton Dewar figured up to see how much they needed to protect their trades. They estimated that they needed $68,000 to settle up trades through the board of trade clearing house; $90,000 to deposit for additional margins, and $60,000 to make good the checks which had been thrown out by the bank the day before, making a total of $218,000. (Rec., 314, 388, 161, 331.) The cashier took these figures down at the time. (Rec., 316.)

Wilshire then went out and shortly afterwards returned with an envelope from which he took four bills of exchange and the certificate of deposit. Each of the bills was for the sum of $100,000, and they were all drawn by the Fidelity National Bank upon the Chemical National Bank of New York, and all dated June 14, 1887, one payable to the order of Wilshire, Eckert & Co., and one to the order of J. W. Wilshire (not in suit), and the other two, upon which appellee brought suit, were payable, one to the order of C. J. Kershaw & Co., and the other to the order of the American Exchange National Bank. (Rec., 85.) The four bills and the certificate of deposit made up the $600,000 which the Fidelity Bank had wired the American Exchange would be brought from Cincinnati by Wilshire.

To go back for a minute in our story: Upon June 13th Wilshire was in Chicago, and promised Kershaw & Co. that he would on the next day deposit $200,000 for their

use in the Fidelity bank. Wilshire went to Cincinnati that night, and the next day Kershaw & Co. drew a draft for $200,000, in anticipation of this deposit, and left it with the American Exchange, asking them to find out by wire if the deposit had been made, and if made, to forward the draft for collection. (Rec., 401–2, 404.)

The American Exchange telegraphed the Fidelity upon June 14th, as follows: "Has two hundred thousand been "placed with you for C. J. K. & Co.?" and the Fidelity replied, upon the same day, "Not yet made"; so that the draft was not sent forward. (Rec., 53–57.) But this promise of Wilshire, and the previous course of dealing between the two banks, prepared the American Exchange for receiving upon the morning of the 15th the certificate of deposit for $200,000.

Now, to return: The paper which Wilshire took from the envelope, or that part of the paper in suit here, was delivered by Wilshire to Kershaw & Co. Appellee took it on deposit from Kershaw & Co., and placed it to their credit, in accordance with their usual course of business. The evidence upon these points is as follows:

Wilshire says he laid the envelope containing the paper on the table before the bank officers (Rec., 85), and that according to his best recollection, the papers were all delivered by him to Mr. Dewar, the cashier, but that as to this he is not positive. (Rec., 111.) Upon cross-examination, he says he took out the contents of the envelope and laid them on the table, examining them at the same time. (Rec., 110.)

Hoyt, a witness for defendant, says Wilshire handed him the two drafts not in suit, and he handed them to Irwin, Green & Co., and that the other $400,000 was delivered to C. J. Kershaw & Co. by Wilshire. (Rec., 159.)

Hamilton Dewar says Wilshire took the paper out of the envelope and it was inspected by all who were present, and that he (Hamilton Dewar) then took the certificate of deposit and two of the drafts and handed them to the cashier and told him to place them to their credit. (Rec., 389.) (Hamilton Dewar was the member of the firm of C. J. Kershaw & Co. who attended to their financial matters and looked after their business with the bank.)

Eggleston says that there was $600,000 that was brought up from Cincinnati, and it was agreed between Mr. Irwin and Mr. Kershaw that the former should take $200,000 and the latter $400,000, and the money was handed over to Mr. Irwin and Mr. Kershaw. (Rec., 197.)

Kershaw says he understood $400,000 was to be given to them, if it was sufficient to carry them that day, and he said he thought $400,000 would carry them through, and the drafts and certificate of deposit were produced and divided in that way, but whether Wilshire handed him the drafts first or handed them first to Irwin he didn't know. (Rec., 244.)

A. L. Dewar, the cashier, says that Wilshire "took the "exchange out of his pocket—it was in an envelope—and "passed it around the table." (Rec., 315.) Hoyt, Wilshire, Eggleston, Kershaw and A. L. Dewar were seated at the table, and Hamilton Dewar and Mr. Irwin were standing. (Rec., 342.) "When Mr. Wilshire took "from the envelope the letter of advice and the four "drafts, what was done with them? A. My distinct "recollection is that they were passed around the table "and examined by those present." (Rec., 329.) "The

"exchange was then finally handed to me by my brother, "$200,000 exchange and $200,000 letter of credit." (Rec., 315.)

This evidence establishes the fact, we think, that the certificate of deposit and two drafts were delivered to C. J. Kershaw & Co. Wilshire himself says, "The division was made by the parties who received the money," and that C. J. Kershaw & Co. received $400,000, and Irwin, Green & Co. $200,000. (Rec., 82.)

After the manner of dividing the $600,000 was settled, Hamilton Dewar endorsed the two drafts, "Dep. acct. C. J. Kershaw & Co.," and "for deposit," respectively (Rec., 34, 389), and handed them, and the certificate of deposit, to the cashier, and told him to place them to their credit.

It had been the custom of the bank to place such letters and drafts to the credit of C. J. Kershaw & Co. (Rec., 322, 406), and the evidence shows that all the parties in interest understood and expected that this deposit would be credited as cash.

Wilshire says he delivered the money with the understanding that it was to be placed to the credit of Kershaw & Co. by the American Exchange, and that Mr. Dewar, the cashier, showed him a deposit ticket which gave credit on the books of the bank to C. J. Kershaw & Co. (Rec., 83.)

Defendant's counsel asked Mr. Hoyt in what shape the American Exchange Bank gave Kershaw & Co. credit for the $400,000, and he replied that they made a deposit ticket and gave it to Mr. Wilshire. (Rec., 159.)

Mr. Kershaw says he understood when he left the bank that the money was there to their credit for them to draw against. (Rec., 247.)

Hamilton Dewar says he handed the $400,000 to his brother, the cashier, and asked him to place it to their credit. (Rec., 389.)

The cashier says it was the custom of the bank to place such drafts and certificates of deposit to the credit of C. J. Kershaw & Co., and that these drafts and this certificate were handed to him by his brother and taken by him without any agreement or arrangement whatever. (Rec., 315–319.)

Mr. Orr, the assistant cashier, says that it was the usual course of business in the bank to place such drafts and certificates of deposit to the credit of C. J. Kershaw & Co. as cash items, and that there was no departure from the usual course of business in this case. (Rec., 406–7.)

The law questions to be argued on these appeals make it very important to see what appellee did because of receiving this deposit of $400,000.

Before this deposit was received the account of Kershaw & Co. was overdrawn $245,477.01. After it was received appellee placed $399,200, the full amount of the deposit, less $800 charged for exchange, to the credit of C. J. Kershaw & Co. The whole amount was credited *unconditionally* and in *one item*. It was not credited as *paper*, but as *cash*.

This, as we have shown, had been the usual course of business between appellee and Kershaw & Co. This was, as we have also shown, what all the parties understood appellee was to do with this particular deposit. Appellee, therefore, in reliance upon the Fidelity bank's paper, canceled Kershaw & Co.'s overdraft of $245,477.01 and gave them a credit balance of $153,722.99. This was on the morning of June 15th.

As soon as the bank opened there was a run upon the account of C. J. Kershaw & Co. and before 11 o'clock appellee had paid and certified their checks to the amount of $239,930.78. It received on deposit meanwhile $25,249.40 (Rec., 22), but this was a draft drawn against a shipment of wheat which appellee had held as collateral security, and it did not better appellee's condition one bit.

Appellee, therefore, in reliance upon this deposit of $400,000 of Fidelity bank's paper, not only canceled an overdraft of $245,477.01, but also gave Kershaw & Co. $239.930.78 fresh money, making a total of $485,407.79.

By crediting this paper as cash and using the same in canceling the overdraft, appellee also waived its right to sell for that purpose the grain it held as collateral security. The result of this was that when appellee did sell the grain after the Fidelity bank paper was dishonored, it only realized $449,194.88 for the same grain which, when appellee stopped paying Kershaw & Co.'s checks on June 14th, was worth $544,894, a shrinkage of $95,700. (Rec., 37, 73.)

When appellee had paid Kershaw's checks to the amount of $239,930.78, as above stated, the account was overdrawn $60,958.39, but appellee would have still continued paying, as the evidence shows, if Kershaw & Co. had not found that it would take $200,000 to pay their differences in the Board of Trade Clearing House, instead of $68,000, as they had estimated in the morning. Appellee refused to certify this check for $200,000, and Kershaw & Co. therefore decided to suspend.

The Fidelity bank placed the amount of the certificate of deposit on its books to the credit of the American Ex-

change and the latter charged the same on its books to the Fidelity bank as a cash deposit and notified the Fidelity bank that it had done so.

From the 28th of April, when the Fidelity bank sent the first certificate of deposit to appellee, down to the 15th of June, the Fidelity bank had represented that Wilshire, Eckert & Co. were depositing funds with it, which it was remitting to the American Exchange, and the Fidelity's telegrams of June 14th held out Wilshire as the owner of the $600,000 which he was to bring to Chicago to protect his trades.

Before going further, we desire to call the particular attention of the court to the fact that, although the doors of the Fidelity National Bank remained open six days after this paper was taken by appellee, that bank made no complaint that appellee had not acted in an honest and straightforward manner in all these transactions. Even E. L. Harper, although he stopped payment of the two bills of exchange in New York, and refused to pay the certificate of deposit when presented to him personally in Cincinnati, did not have the face to claim that appellee had acted in any respect contrary to the instructions of the Fidelity National Bank.

If the court will take the trouble to read what took place at the interview with him and Hopkins when payment of the certificate of deposit was demanded (Rec., 421–2) it will be satisfied that Harper was enraged because he had been unable in any way to complicate appellee in his rascalities.

Transactions between the Fidelity National Bank and Wilshire which were concealed from the American Exchange National Bank.

There were things going on between the officers of the Fidelity National Bank and Wilshire which appellant says in his answer amounted to a conspiracy to embezzle the funds of the Fidelity, but which were never revealed to the American Exchange until disclosed by the evidence in these cases.

Mr. Wilshire testifies that his trades with C. J. Kershaw & Co. were made for the account of E. L. Harper, vice-president of the Fidelity National Bank, and that he had an arrangement with Harper under which Wilshire, Eckert & Co. gave due-bills to the Fdelity bank, and drew checks upon that bank, with the understanding that they were to be met and taken care of by Harper from his own funds. He testifies that when he presented to the American Exchange the certificate of deposit in suit, saying that Wilshire, Eckert & Co. had deposited $200,000 in the Fidelity National Bank to the credit of the American Exchange National Bank for the use of C. J. Kershaw & Co., he knew no such deposit had been made, and that this statement of the certificate was false (Rec., 110), and that he knew the American Exchange was acting on the faith of the certificate and placing the amount of it to the credit of C. J. Kershaw & Co. (Rec., 114.) Mr. Wilshire was indicted by the grand jury, but was used as a witness on behalf of the prosecution, and the criminal proceedings have, therefore, been discontinued. Being examined on behalf of the appellant in these cases he testified as follows:

"Q. You have stated, Mr. Wilshire, that this package was given to you by Mr. Harper in the Fidelity National Bank. Now state precisely what Mr. Harper said to you at that time, as nearly as you can, in regard to it?

"A. Mr. Harper had shown me this dispatch, stating that if six hundred thousand dollars was brought up that evening, that the wheat deal would be safe. That is as near as I can remember the substance of the telegram. He then instructed me to take this package, which he said contained $600,000, go to Chicago, and go to the American Exchange National Bank, and deliver the package to them, upon the condition that they would place the $600,000 to the credit of Irwin, Green & Co. and C. J. Kershaw & Co., on the books of the American Exchange Bank, *pro rata* according to the amount of wheat each held; if they agreed to this, I was to deliver the contents of the package to them.

"Q. What, if anything, was said by him about their agreeing to carry the wheat deal; and how long they would carry it?

"A. I don't know as any time was mentioned.

"Q. Well, what was said about it?

"A. Well, he said that they were to take care of the wheat deal—or the deal as he mentioned it—but I don't remember that he mentioned any specified time. The impression on my mind was that it was for the day ensuing." (Rec., 87-88).

A. P. Gahr, a witness for the appellant, accompanied Wilshire to Chicago on the night of June 14th. He was a confidential friend of E. L. Harper, and held in his name for Harper, stock in the Fidelity, and acted as a director of the bank. Mr. Gahr testified as follows:

"On the 14th of June, I went to Chicago—on the night of the 14th—in company with J. W. Wilshire, and at the request of Mr. Harper, for the purpose of taking into my custody what he stated to me was $600,000, which he had delivered to Mr. Wilshire. I was to meet Mr. Wilshire on the C., H. & D. train at Cumminsville, and get the money from him, for the purpose of preventing any attachment of the money on his person at Chicago. I went to the C., H. & D. depot, and Mr. Wilshire had changed his plans, and was on the train, instead of getting on at Cumminsville, as he intended." (Rec., 130.)

* * * * *

"My instructions in regard to this matter were very brief. I had no specific knowledge of what was to be accomplished before this money was to be delivered there. The instructions which Mr. Harper had given me were very brief; that Mr. Wil-

shire was to get certain guarantees—I don't know whether from the American Exchange Bank or from other persons; but I had the impression that it was from the bank." (Rec., 131.)

Upon cross-examination Mr. Gahr testified as follows:

"Q. Did not Mr. Harper, in his instructions to you, tell you what his object was in sending you to Chicago that night?

"A. Yes, sir; he stated that his object was to ensure the safe transportation of the money, and to prevent any possibility of its being attached on Mr. Wilshire—

"Q. What money, Mr. Gahr?

"A. The $600,000 which he said Mr. Wilshire had.

"Q. Did he explain what that $600,000 was for?

"A. Yes, he said that Wilshire was to take it up there, and if the parties would guarantee to protect the deal he was to deliver it over—but—any way I don't know exactly about that. I didn't know then in what form the $600,000 was." (Rec., 134.)

* * * * *

"I did not expect to go to Chicago or know anything about going, up to about twenty minutes before the train left. Mr. Harper telephoned me at the St. Nicholas. I had just got there, and had been over in Covington, and Mr. Harper called me up by telephone and asked me to come right down to his house on West Fourth street. I looked at my watch and it was then about—. I can say, positively, that all the instructions Mr. Harper gave me did not take a minute." (Rec., 135.)

* * * * *

"Mr. Harper had told me that Wilshire's wife was to carry the money up to Chicago, but at the last moment he decided that it would not be best; she being a woman, they might bulldoze her into giving the money up.

"Q. Did Mr. Harper explain to you why Mr. Wilshire's wife was to take charge of the money?

"A. For the same purpose that I did; simply to take charge of it. That is all the explanation he gave me.

"Q. And the purpose of your going was simply to take charge of the money, was it?

"A. Yes, sir.

"Q. And to see that it went safely to its destination?

"A. No, sir, I was not so instructed.

"Q. Please state again, and as plainly as you can, Mr. Gahr, what instructions Mr. Harper gave you through the telephone?

"A. The instructions were not given me through the telephone, but on the steps of Mr. Harper's residence. I was at the St. Nicholas; I was over in Covington nearly all day looking up the matter in connection with those anonymous circulars. I re-

turned to the St. Nicholas about five minutes before 8 o'clock, I think. I knew that Mr. Harper was exceedingly anxious in regard to these anonymous circulars, so I telephoned him in regard to the result of my investigations in Covington. I called up his house, and told him I guessed we were on the wrong track. He said, 'where are you?' and I told him that I was at the St. Nicholas, and had just got there. He said, 'Come down here, I want to see you.' I said 'Right away?' He said, 'Yes, at once; I want you immediately.' Well, I got on a car and went down there. He must have been waiting for me in the hall, for the minute I rang the bell he opened the door and came out on the step, said, 'You go down to the C., H. & D. depot and get on the Chicago train; Joe Wilshire will get on at Cumminsville. He has six hundred thousand dollars, and I am afraid they will attach him in Chicago. You go and take charge of the money, and after you get to Chicago, if they say it is all right, deliver the money to him. I expected to send his wife with him to take charge of the money, but on thinking it over concluded it was best not.' I don't think it took more than a minute altogether for him to give me instructions, and I started at once for the C., H. & D. depot.

Q. That is all the instructions you had from Mr. Harper?

A. Yes, sir; that is all.

Q. And you say that Mr. Wilshire did not state to you on the train what his instructions were in regard to this money, and the purpose for which this money was sent to Chicago?

A. No, sir; he did not.

Q. Now, Mr. Gahr, I want you to consider that carefully, and state positively whether this was all that passed between you and Mr. Harper in regard to this money, so that you can state positively whether or not Mr. Wilshire stated to you on the train, or after he got to Chicago, what his instructions were?

A. Mr. Wilshire made no statement to me concerning his instructions from Mr. Harper, and I have stated all the instructions that I had from Mr. Harper before going to the train." (Rec., 136–138.)

* * * * *

"Q. Did he indicate to you what papers he meant?

A. Well, you see Mr. Harper had told me that he was to get a written guarantee from the American Exchange Bank—

Q. Of what?

A. That the deal should be carried through on that $600,000.

Q. An indefinite time?

A. For the month of June.

Q. When did Mr. Harper say that to you?

A. After I came back, I am pretty sure.

Q. Then, Mr. Gahr, that could not have had any effect on your mind in determining anything in regard to this matter at the time you were in Chicago, or what papers they were signing, could it?

A. Well, you see he had stated to me before going to Chicago that Mr. Wilshire was to get a written guarantee—

Q. But, Mr. Gahr, I asked you to carefully go over what instructions Mr. Harper had given to you, and to state just what he said, and you didn't state then anything about a written guarantee?

A. Yes, sir; I think I mentioned it.

Q. Now then, Mr. Gahr, will you kindly state just what Mr. Harper said?

A. He said that Mr. Wilshire was to get a written guarantee from the bank, and if he gets it you are to deliver this money to him.

Q. Then your statement, 'for the month of June,' was merely an inference?

A. That is my understanding derived from what he told me after I came home. It is hard to draw the line—I have gone over this matter so often that I supposed I had stated this before.

Q. Now, these instructions that you speak of, you understood were the instructions of Mr. Harper in his individual capacity, did you?

A. Yes, sir; I did.

Q. Mr. Gahr, you did not for a moment suspect that Mr. Harper was giving you directions for the bank in connection with this transaction?

A. No, sir, I did not." (Rec., 142–143.)

Mr. Wilshire and Mr. Gahr went to the same hotel in Chicago, but agreed *not to know each other*, and Mr. Gahr was known as A. P. Gordon. (Rec., 141, 151.)

While Mr. Gahr was in Chicago on this day, June 15th, he received several telegrams from Mr. Harper, signed "Champion," which were as follows (Rec., 156–7.):

"The Baltimore and Ohio Telegraph Company.

Time, 8:52 A. M.—Dated, Cincinnati, O.—Received at Palmer House 6, 15, 1887.

To A. Gahr, Hotel Richelieu:

Don't give amount unless you have positive assurance in

writing that all will be carried out according to contract. Have Joe transfer all to H. immediately. Save giving the two hundred letter if possible.

CHAMPION."

"THE BALTIMORE AND OHIO TELEGRAPH COMPANY.

Time, 12:03 P. M.—Dated, Cincinnati, O., 15—Rec'd at Palmer House 6, 15, 1887.

To A. P. Gordon, Hotel Richelieu:

Please have drafts made on letter come direct. Don't fail in this.

CHAMPION."

"THE BALTIMORE AND OHIO TELEGRAPH COMPANY.

Time 12:56 P. M.—Dated Cincinnati, O., 15.—Rec'd at Palmer House, 6, 15, 1887.

To A. P. Gordon, Hotel Richelieu:

Arrange for the one payable to American Exchange to apply on their account; this will make one less for other party, which will be made up in some other way.

CHAMPION."

"THE BALTIMORE AND OHIO TELEGRAPH COMPANY.

Time 4:16 P. M.—Dated Cincinnati, O., 15.—Rec'd at Palmer House, 6, 15, 1887.

To A. P. Gordon, Hotel Richelieu:

Party has positive instructions not to deliver amount unless parties guaranteed to carry through without further amounts. If this has not been done, all should be stopped.

CHAMPION."

Mr. Gahr did not receive the earliest of these telegrams until after 12:30 P. M., and the latest was not received until after 4:16 P. M., as it did not reach Chicago until that time. (Rec., 156.)

This evidence opens up to the daylight the scheme of E. L. Harper to involve the American Exchange Bank in his own personal ruin and the ruin of the Fidelity Bank which he wrought. After he had started Wilshire for

Chicago, he sent Gahr to look after Wilshire. After he had sent $600,000, he tried to withdraw a part of it. First, he tried to hold back the certificate of deposit for $200,000, then, after he received the telegram of inquiry from the American Exchange about draft No. 16,412, he thought he saw an opportnnity to withhold that, and telegraphed "A. P. Gordon," "Arrange for the one payable "to American Exchange to apply on their account; this "will make one less for other party, which will be made "up in some other way," and at the same time he telegraphed the American Exchange "We want number six-"teen four twelve to apply on your account."

The fact is that Harper was getting "rattled" and did not dare trust Wilshire or anybody else.

Gahr was in Chicago under an assumed name, and his presence was not known to the American Exchange. Wilshire was still put forward as the principal.

Mr. Gahr and Mr. Wilshire returned to Cincinnati together the night of June 15th, and arrived about 8 o'clock in the morning. At about quarter to 9 o'clock Mr. Harper called at Mr. Gahr's house. (Rec., 155.)

We give Mr. Gahr's testimony as to what then took place, in his own language:

"I went home and Mr. Harper came up to see me. Mr. Wilshire went down to see Mr. Harper. And Mr. Harper then told me as to the condition of things here; how he was ruined; that the bank, as he expressed it, had been gutted, and everything gone to Chicago. He said that he wanted me to get his papers drawn up ready for an assignment. That afternoon we had a meeting in Judge Jordan's office—Mr. Harper, myself, Mr. Wilshire, Judge Jordan and Isaac Jordan. Mr. Harper wanted Mr. Wilshire to give him checks for the six hundred thousand dollars, and Mr. Wilshire would not do it. So that after a great deal of consultation, we concluded to stop the payment of those drafts at the Chemical National Bank of New York. Mr. Harper requested me to draft a telegram ordering all payments stopped.

We had the numbers of the drafts. And I wrote out a telegram to the Chemical National Bank directing them to stop payment on the drafts, designating them by their numbers, such amounts, and payable to such persons. Mr. Wilshire sent the telegram for the drafts payable to Wilshire, Eckert & Co. and J. W. Wilshire." (Rec., 153.)

Mr. Wilshire himself confirms this testimony (Rec., 119) about stopping payment of the drafts. No notice of this action was given to the American Exchange, and no further communication of any kind was sent to that bank either by Wilshire or by any officer of the Fidelity Bank.

Mr. Wilshire testifies that when he went to the American Exchange, on the morning of June 15th, he stated that his instructions were to deliver the $600,000 to that bank, provided it was credited up to the account of C. J. Kershaw & Co. and Irwin, Green & Co., according to the amount of wheat they each held, and provided also the bank took care of C. J. Kershaw & Co. and Irwin, Green & Co. in the protection of the wheat deal during that day.

He says the bank assented to these conditions.

Mr. Wilshire states what his instructions were and what he said to the officers of the bank in various forms, and there is much contradiction in his evidence. (Rec., 82, 84, 85, 87–89, 107–109, 123–125.)

Every other person who was present at this interview directly contradicts Wilshire.

A. L. DEWAR, the cashier, testifies as follows:

"Q. Did Mr. Wilshire state that he had any instructions with reference to leaving this exchange and letter of credit?
A. None whatever, sir.
Q. Did he ask for any agreement on the part of the American Exchange National Bank?

A. No, sir.

Q. Did you state to him, or did he ask you to state, that the American Exchange Bank would protect the wheat deal?

A. There was no such conversation at all, sir.

Q. Did you make any arrangement or agreement of that kind?

A. None whatever.

Q. With Wilshire or Hoyt or any one?

A. No, no agreement at all." (Rec., 315.)

* * * * *

"Q. Did Mr. Wilshire state that he was instructed to leave that letter of advice and those drafts with the American Exchange Bank, if the American Exchange Bank would place $400,000 to the credit of C. J. Kershaw & Co., and $200,000 to the credit of Irwin, Green & Co., and protect the wheat deal?

A. Most positively not.

Q. Did he say anything of that kind?

A, Nothing at all, sir; not a word.

Q. Was anything said about placing $200,000 to the credit of Irwin, Green & Co. by the American Exchange Bank?

A. Not one syllable, sir." (Rec., 329.)

HAMILTON DEWAR testifies as follows:

"Q. During the interview did Mr. Wilshire state that he brought up this $600,000 with instructions to leave it if the American Exchange National Bank would place $400,000 to your credit, and $200,000 to the credit of Irwin, Green & Co., and protect the wheat deal?

A. No, sir; there was nothing said of that kind.

Q. Did he state anything of that kind?

A. He simply handed me $400,000, and asked me if that would be enough for my account. I told him it would be plenty.

Q. Did he say anything about instructions at all?

A. He said nothing at all to me about instructions.

Q. Did he say anything about the bank's protecting you or protecting Irwin, Green & Co.?

A. No, sir.

Q. Was there any agreement or arrangement made by your brother, the cashier, or anybody on the part of the American Exchange Bank, to protect the wheat deal or to protect you?

A. There was nothing said further than this: that I had told him how much money I wanted. He said, 'All right, go ahead.' That is all he said." (Rec., 390–391.)

Mr. HOYT, a witness for defendant, testifies that

"Wilshire said he had come up with $600,000 for C. J. Ker-

shaw & Co., and Irwin, Greene & Co., if they would support the market, and they assented. By 'they' witness said he meant the brokers C. J. Kershaw & Co. and Irwin, Greene & Co." (Rec., 161–2.)

Upon re-direct examination the United States attorney asked this witness the following question (Rec., 167):

"Mr. Hoyt, have you not stated to Mr. Drummond, and to myself, in substance, that the American Exchange National Bank agreed to see that the market was supported, if the $400,000 was delivered by Wilshire?"

To which witness replied:

"No, sir."

C. J. KERSHAW testifies:

That Wilshire said he had brought up six hundred thousand dollars, which he was going to leave, if he was satisfied it was enough to carry C. J. Kershaw & Co. through the day; that at the interview at the bank Kershaw said $400,000 would be enough to carry them through the day, so Wilshire gave them $400,000, and Irwin, Greene & Co. $200,000. (Rec., 255–6, 258–9.)

He further testifies that nothing was said about the American Exchange protecting the wheat deal, nor about the American Exchange placing the $600,000 to the credit of C. J. Kershaw & Co. and Irwin, Greene & Co., *pro rata*, according to the amount of wheat they held. (Rec., 255–6.) He simply understood that the bank was to assist C. J. Kershaw & Co. to the extent of the $400,000. (Rec., 243–4, 247, 259–60, 262.) Wilshire said if they got through that day all right, he or his principals would be able to furnish all the money needed. (Rec., 262.)

Mr. EGGLESTON testifies:

That he was present at this interview at the bank, and was attentive to everything of importance that took place (Rec., 211), and that he did not hear anything said about supporting the market nor about conditions on which the money was to be delivered. (Rec., 197.)

Mr. D. W. IRWIN testifies as follows (Rec., 410–11):

"Q. Did Mr. Wilshire say anything about leaving this money if the American Exchange Bank would place $400,000

to the credit of C. J. Kershaw & Co. and $200,000 to the credit of Irwin, Greene & Co. ?

A. No, sir, I did not hear that.

Q. Was there anything said by anybody about the American Exchange Bank protecting your firm and protecting C. J. Kershaw & Co. through the wheat deal or through the day, or anything of that kind?

A. No, sir; not to my knowledge."

Wilshire is further contradicted on material matters as follows:

He said his instructions were to deliver the money provided the American Exchange would agree to support the wheat deal *for the day.*

Gahr says Wilshire was to get a written guarantee from the American Exchange to carry the deal *through the month of June.* (Rec., 142.)

Harper's telegram says:

"Party has positive instructions not to deliver amount unless parties guaranteed to carry through without further amounts." (Rec., 156.)

Wilshire is discredited as a witness by appellant's counsel.

They say that Wilshire, Harper and Hopkins conspired together to embezzle the funds of the Fidelity National Bank and use the same in the purchase of wheat in Chicago, and that the certificate of deposit in suit and the draft payable to the order of C. J. Kershaw & Co. were issued in pursuance of this conspiracy. (Answers of defendant. Agreed Record, appeal No. 1,111, p. 15–16.)

Wilshire is further discredited by the fact, according to the testimony of Mr. Gahr, that he obtained the funds from Gahr in Chicago by lying.

Mr. Gahr says Harper told him Wilshire was to get a written guarantee from the bank, "and if he gets it you "are to deliver this money to him." (Rec., 143.)

Mr. Wilshire says Mr. Gahr came to him on the train and said he had instructions from Harper to take charge of the package until the instructions Wilshire had received from Harper had been agreed to. (Rec., 87.)

Gahr says that before he gave the money to Wilshire, he asked Wilshire, "Have you everything fixed up?" and Wilshire replied, "Yes, everything is all right." Gahr asked further, "Have you got the guarantee?" and Wilshire replied, "Yes, everything is all right; they are "signing the papers now," and then Gahr gave him the money. (Rec., 131.) Mr. Gahr says he would not have given Wilshire the money if he had not told him this (Rec., 145), but that he discovered afterwards that he had been misled, and that the bank had not signed any papers and had not intended to sign any. (Rec., 142.)

In the afternoon Mr. Gahr again asked Mr. Wilshire about the guarantee, and Wilshire told him the bank would not give any. (Rec., 146–7.)

We might go on with this discussion, and point out further material contradictions of Wilshire's testimony, and contradictions in that testimony itself, and call attention to the figures made by the parties and the cashier of the American Exchange on the morning of the 15th of June, and show how inconsistent all these are with Wilshire's claim that the American Exchange agreed to "protect the wheat deal," either without further funds, or for the balance of June, or even for that day.

We have a theory, in regard to Wilshire's acts, which seems to be almost conclusively borne out by the testimony, taken as a whole. It is this: Mr. Wilshire personally was interested to an extent beyond his, or any

ordinary, fortune, in the transactions in the wheat market in Chicago. He was interested because he was, so far as Kershaw & Co. and other Chicago brokers were concerned, the principal debtor to them in these matters. When the break in the wheat market came, on the 14th, he knew that it meant some millions of dollars of personal loss to him. It was his interest to sustain the market. It was his interest to get the American Exchange National Bank to help him sustain it. But that was entirely secondary to the other. He was willing to appear to Harper as following his instructions, but he went to Chicago for the purpose of delivering that money, and to save himself at all hazards. When he appeared in appellee's bank, on that morning, he had come there with the purpose of delivering that money, and of holding up the price of wheat, instructions or no instructions.

He was put forward as a witness to show an agreement of a most extraordinary nature. In addition to being contradicted all through his testimony, he is flatly contradicted upon the subject-matter of this alleged agreement, by five witnesses. It goes uncontested in the case that he appeared upon the steps of appellee's bank while the interview at the bank was going on, or immediately thereafter, and said that which he knew to be false to Mr. Gahr for the purpose of getting possession of the papers. It goes uncontested that he told Mr. Gahr, that same day, that he had not obtained the agreement; that the bank declined to make it—the very agreement that he now testifies was made. On top of that, he admitted to Mr. Gahr that of course the bank would not give such a guaranty.

If these circumstances do not convict Mr. Wilshire, not only of an utter inability to tell a straight story, but also

of an attempt to unload his difficulties upon his brokers in Chicago, and of a design, instructions or no instructions, to save himself at anybody's and everybody's expense but his own, then there is no force in testimony. Is it possible that in a case of this importance, such discredited testimony can be advanced to defeat the rights of appellee and to establish that it came by these papers in suit dishonestly and in violation of law and good faith? If there is any good faith in the case, it is not in the testimony of Wilshire.

BRIEF.

I.

CASE, NUMBER 1110.

We first present the appeal from the decree on the bill of exchange for $100,000, payable to the order of appellee.

The only defense made to this suit was, that appellee was not the owner of this bill of exchange, but that the same came into its possession without any consideration whatever therefor paid by it to the Fidelity National Bank, and that said bank never at any time received any consideration from any person for said bill of exchange.

Appellant claims that this bill could not take effect until delivered *to the payee*; that said delivery must have been made *by the drawer*, the Fidelity National Bank; that, therefore, Wilshire was acting for that bank in delivering this paper, and that, as between the *drawer* and the *payee*, want of consideration may be shown.

This bill was drawn in Ohio upon a bank in New York and was payable in New York. It is, therefore, a foreign bill of exchange. The law recognizes *four* parties to such a bill, namely, the *drawer*, the *drawee*, the *payee* and the *remitter* or purchaser of the bill. The usual course of dealing with such bills is for the drawer to deliver the bill to the remitter, and for him to deliver it to the payee. Where such is the course of dealing, the remitter does not act as the agent of the drawer, but acts for himself, and in a suit by the payee against the drawer, want of

consideration cannot be shown, if the payee is a *bona fide* holder for value.

Munroe v. *Bordier*, 8 M., G. & S., 861 (65 E. C. L. R.)

This was an action of assumpsit on two foreign bills of exchange. The first count of the declaration stated that the defendants in London made their bill directed to certain persons in France, under the style of A. de Wain & Co., requiring them to pay 22,000 francs to the plaintiffs, and the defendants then delivered the bill to certain persons carrying on business in London under the firm name of Coates & Co., which firm delivered the bill to the plaintiffs.

The defendants pleaded that they made the bill and delivered the same to Coates & Co., for the use of the plaintiffs, on the faith and terms of being paid the price and value thereof, but that they had never received any consideration therefor.

Plaintiffs replied that Coates & Co., whom the plaintiffs then believed to be the lawful holders of the bill, delivered the same to plaintiffs for a valuable consideration, and without notice of the defense pleaded by defendants.

Defendants demurred to this replication, and the case was heard on demurrer.

The court (WILDE, C. J.), says:

"The writers upon foreign bills contemplate the existence of four parties—the giver of value, or purchaser of the bill, or remitter, as he is often called—the drawer—the party to whom the bill is to be paid abroad—and the drawee. The ordinary course of dealing with reference to foreign bills, as described by them, begins by the sale of the bill by the drawer to some person other than the payee. It therefore does not contemplate that the consideration for the bill should necessarily move from the payee to

the drawer, or that no person but the drawer should have a right to confer a title to the bill upon the payee. 'In case of a remitter's failing before he has paid the value, and the person on whom the bill is drawn gets advice of this occurrence before acceptance, and therefore refuses to accept it, the bill on its returning protested, shall be paid notwithstanding, with all charges, by the drawer, under proof by the possessor that he negotiated the said bill and paid a just value for it.' (*Beawes Lex Mercatoria*, p. 418.) According to that rule, the plaintiffs would in this case be entitled to recover, for the plea does not deny that they gave a just value for the bill."

The court further says that the drawers placed the bill in the hands of Coates & Co. with a controlling power over it, and that as Coates & Co. delivered it to the plaintiffs, who were the payees, for value, they acquired a good title, and the drawers are liable, although they never received any consideration.

The court says:

"Suppose the bill had been given to Coates & Co. for their accommodation, or a promissory note had been given to them made payable to the plaintiffs, in order that they, Coates & Co., might borrow money upon it, or hand it over to the payees in discharge of a debt, surely the payees, in either case, might sue upon the instrument, without proving the giving of value to the drawer or maker. The want of such value could not be relied upon as an answer to the action, on the ground of the contract between the immediate parties to the instrument being *nudum pactum*."

Daniel on Negotiable Instruments, Sec. 178:

"If the remitter purchase the bill on credit for himself, and sell it in good faith to the payee, the drawer could not resist the payee's suit for want of consideration if the remitter failed to pay the purchase money. Thus, if Duncan, Sherman & Co. of New York, being indebted to Gilliatt & Sons of London, procure Fisk & Hatch, New York, to draw a bill on London, in favor of Gilliatt & Sons, and remit it to the latter in payment of the debt, the liability of Fisk & Hatch to Gilliatt & Sons will be absolute, whether any consideration for the drawing of the bill has been paid by Duncan, Sherman & Co. or not."

Kyd on Bills, 3:

"The parties to bills of exchange are generally four; two at

the place where the bill is drawn and two at the place of payment; as where A, a merchant at Amsterdam, owes money to B, a merchant in London, instead of sending the money in specie to B, he applies to C, another merchant in Amsterdam, to whom D, a fourth person residing in London is indebted to an equal amount. A pays to C, the money in question, and receives from him a bill directed to D to pay the amount to B, or any one appointed by him, who sends it to his correspondent B, with an order that the money be paid to him by D."

Parsons on Notes and Bills, Vol. 1, 181:

"Although it should appear on the face of the bill sued on, that the plaintiff was the immediate promisee of the defendant, the plaintiff may show that he was not so in fact, but that the bill came to him through other hands. Thus the payee is in general the immediate promisee of the drawer, and in an action by the former against the latter, a want or failure of consideration for drawing the bill is a good defense. But if A, in New York, being indebted to B, in London, procures C, in New York, to draw a bill on London in favor of B, and remits the same to B in payment of his debt, the liability of C to B will be absolute, whether C received any consideration from A or not, for the transaction is the same in substance, as if the bill had been drawn in favor of A and by him endorsed to B; and in that case in an action by B against C, there could of course be no inquiry into the consideration between C and A."

This law is not peculiar to foreign bills of exchange, but is applicable to all kinds of commercial paper, for which the maker receives a consideration from some party other than the payee. In all such cases the payee occupies the same position as an indorsee, and if he is an indorsee for value, the maker cannot set up want of consideration as a defense against him. Thus if A obtains a check or note from B payable to C, and delivers it to C for a valuable consideration, B cannot set up as a defense to a suit brought by C, that A paid nothing for the check or note.

Watson v. *Russell*, 3 B. & S., 34 (113 *E. C. L. R.*)

A took the charter of a ship from C, for which A

agreed to pay 120 pounds every four weeks in advance. A, through the assistance of B, sublet the ship. A, having made the first payment, made default upon the second, and C threatened to forfeit the charter. A thereupon obtained from B an advance of sixty pounds to use upon the second payment and B drew his check for that amount directly to the order of C, but gave it to A to deliver, instructing him, however, not to deliver it except in consideration that the vessel should be allowed to perform her charter.

A sent the check to C in a letter, saying: "Enclosed, "you have a check for sixty pounds, which will pay the "charter up to Monday next; the end of next week I "will send you sixty pounds more." A did not make known to C the fact that the check was not to be used except in consideration that the vessel should be allowed to perform her charter, and as A did not pay the remaining sixty pounds, C stopped the vessel. Thereupon B sued C to recover back his check, or the amount thereof.

The court (CROMPTON, J.) held that the plaintiff could not recover, and said:

"If A, by means of a false pretense or a promise or condition which he does not fulfill, procures B to give him a note or check or acceptance in favor of C, to whom he pays it, and who receives it *bona fide* for value, B remains liable on his acceptance. His acceptance imports value and liability *prima facie*, and he can only relieve himself from his promise to pay C by showing that C is not a holder for value, or that he received the instrument with notice, or not *bona fide*. The instrument is one which C has a right to take, relying on the acceptance or making of the party, and it is no answer to say that there is no consideration as between him and the acceptor or maker, if the holder took it *bona fide* for value."

This case was appealed to the Court of Exchequer and was affirmed, the chief justice saying:

"The plaintiff's check was a negotiable security, and as such

having been taken by the defendant for value, without notice, he has the right to keep it, although the plaintiff may be the true owner as between himself and Keys."

South Boston Iron Co. v. *Brown*, 63 Me., 139.

A made a contract with B for the latter to make a certain machine, and A at the request of B made a note therefor payable directly to the order of C. The latter took the note on account of a certain indebtedness from B and commenced suit upon it against A. The court held that A could not set up failure of consideration as a defense. The court cites and relies upon *Munroe* v. *Brodier*, *supra*.

Parsons on Notes and Bills, Vol. I, 199.

"If a note is put in suit which the maker gave to the payee at the request of a third person, the payee need not show that any consideration existed as between the maker and the party at whose request the note was given."

And, again, upon page 183 of the same volume, the author says:

"If A for a valuable consideration moving from C to him should procure B to make his note in favor of C, it should seem that it would be no answer to an action by C against B that the latter received no consideration for making the note."

See also to the same effect

Glascock v. *Rand*, 14 Mo., 550.

Horn v. *Fuller*, 6 N. H., 511.

Let us apply this law to the facts.

The Fidelity National Bank had for some months been acting, according to its own representations, as a depositary for Wilshire, of funds to be used in his trades with C. J. Kershaw & Co., and these funds had been remitted to the American Exchange, partly by draft drawn by C.

J. Kershaw & Co., partly by draft drawn by Wilshire to the order of C. J. Kershaw & Co., and partly by certificates of deposit, similar to the one in suit. Upon June 14, the Fidelity Bank notified the American Exchange that Wilshire would be in Chicago the next morning with $600,000 for *his use* in his trades with Kershaw and others. When, therefore, Wilshire came to the American Exchange on the morning of June 15th, he came duly accredited by the Fidelity Bank as the *purchaser* of the $600,000 which he brought, and he acted as such in delivering the draft in suit. The fact that this draft was made payable to the order of the American Exchange itself, was not inconsistent with the representation that Wilshire held it as *purchaser and remitter.*

The payee is a holder for value.

Wilshire received value from C. J. Kershaw & Co., and he acted with them in getting the draft placed to their credit as cash by the payee.

C. J. Kershaw & Co. had bought a large amount of wheat for Wilshire, for the payment of which he was liable. Hamilton Dewar estimated that upon the night of June 14th, this liability was about $800,000 more than the value of the wheat on hand. (Rec., 389.)

Wilshire gave Kershaw & Co. the $600,000 on account of this liability. This indebtedness is not disputed.

As Wilshire delivered this paper to Kershaw & Co. in the presence of the payee and with the express understanding that the payee was to take it and place it to the credit of Kershaw & Co., the past indebtedness of Wilshire to Kershaw & Co. was a sufficient consideration to give the payee a good title to the paper for the use of Kershaw & Co.

It is clear, however, that Wilshire was moved to give this paper to Kershaw & Co. chiefly by the consideration that appellee would at once give Kershaw & Co. credit for the amount.

This credit was given and on the faith of it appellee resumed payment of the checks of Kershaw & Co. and paid $239,930.78.

It is also clear that appellee did not receive this paper for collection. That would have defeated the object which Wilshire and Kershaw & Co. had in view. Kershaw & Co. estimated that $218,000 would enable them to stand up against the panic and carry them through the day. Appellee's cashier took down these figures as they were made. Wilshire then brought in the paper and gave it to Kershaw & Co. The two bills were endorsed by Kershaw & Co. "for deposit" and they handed the paper to the cashier with the request that it be placed to their credit. The cashier made out a deposit ticket showing one item of $400,000 deposited with appellee to the credit of C. J. Kershaw & Co. Then Wilshire and Kershaw & Co. left the bank and the whole amount of the deposit (less $800 charged for exchange), was placed to the credit of C. J. Kershaw & Co. on the books of the bank.

There can be no doubt that this state of facts makes appellee the owner of the paper received on deposit.

The law is well settled.

Ry. Co. v. *Johnston*, 27 Fed. Rep. 243,
(*s. c.* 23 Blatchf., 489.)

A, who for many years had kept an account with the Marine National Bank of New York, deposited a sight draft on May 5, 1884, dated that day and drawn by him

on a Boston corporation, which was indebted to him for the amount of the draft. The bank was insolvent at the time of the deposit, but forwarded the draft for collection to its correspondent at Boston, and the same was paid upon May 7th, after the Marine National Bank had failed and closed its doors. When the draft was deposited the bank credited A with it as a cash item, and upon several similar occasions A had deposited similar drafts and had been credited therewith, and they were treated by him as cash deposits. *Held:* (*Wallace*, J.) When a sight bill is credited by a bank to a customer as a cash item, with the latter's assent, the transaction is equivalent to a discount of the bill by the bank. The court also held that the draft in question was not the property of A when paid by the drawee, and that he was not entitled to recover the amount thereof from the receiver of the bank.

The court says:

"Sight bills, drawn by one corporation upon another of prominent financial standing, like the interest coupons of such corporations, or like certified checks upon banks, are generally accepted in commercial usage as the equivalents of money. They have practically the same attributes as bills issued by banking corporations, which are merely promises to pay at sight, and are everywhere accepted as money in the absence of special circumstances affecting the financial standing of the corporation issuing them." * * *

"When a sight bill is deposited with a bank by a customer, at the same time with money or currency, and a credit is given him by the bank for the paper, just as a like credit is given for the rest of the deposit, the act evinces unequivocally the intention of the bank to treat the bill and the money, or currency, without discrimination, as a deposit of cash, and to assume towards the depositor the relation of a debtor instead of a bailee of the paper. If the customer assents to such action on the part of the bank by drawing checks against the credit, or in any other way, he manifests with equal clearness his intention to be treated as a depositor of money, and as such, as a creditor of the bank, instead of a bailor of the paper. Under such circumstances it

should be held that the bank acquires title to the paper, just as it would to a deposit of money." * * *

"Some significance must be attached to a credit entry of the bill upon the books of the bank as cash, and the natural implication would seem to be that the bank, by making such an entry, assumes to receive the bill as money. Correlatively, if the depositor understands that the bank proposes to receive the paper as money, and assents expressly or by acquiescence, it would seem that he consents to part with the title to the paper."

Bank of Circleville v. *Bank of Monroe*, 33 Fed. Rep., 408.

This case was also decided by Judge Wallace. The facts show that the paper was left "for collection," and the court therefore holds that the title did not pass, but affirms the doctrine laid down in the case last cited, in the following terms:

"When the paper consists of sight drafts or checks, and a credit is given when the paper is delivered, as upon a deposit of money, the transaction may be equivalent to the discount of the paper, or the delivery may be treated as a deposit of money, in which case, of course, the title to the paper passes to the banker."

In re Bank of Madison, 5 Bissell, 515.

A customer of a bank having an open and running account, in which it was the usual course of business to credit all notes and bills discounted or collected, endorsed and left a certain note, which was placed to the credit of the customer. The bank failed, and an assignee in bankruptcy was appointed. *Held*, that the note had become the property of the bank.

The court decides that money, checks or bills, deposited by a regular customer, becomes the property of the bank.

Clark v. *Merchants' Bank*, 2 Comstock, 380.

C. & Co. were brokers in Philadelphia, and S. & Co.

were brokers in New York. They were the collecting agents and business correspondents of each other. C. & Co. sent to S. & Co. a bill due at sight to be collected, and directed it to be placed to their credit. At the same time C. & Co. drew sight drafts on S. & Co. for the amount. S. & Co. collected the bill by receiving the check of the drawee, and credited the amount to C. & Co. They then deposited the check in the bank where their accounts were kept, and the bank passed it to their credit as cash and received the cash upon it. S. & Co. stopped payment without paying the drafts of C. & Co. drawn against the bill, and being indebted to the bank more than the amount of the bill. *Held*, that on the receipt of the bill by S. & Co. the title vested in them, and that C. & Co. could not recover the proceeds thereof from the bank.

Bank v. *Bank*, 7 Lans., 197.

Held, that checks deposited in a bank became the property of the bank.

In re Franklin Bank, 1 Paige, 249.

Held (WALWORTH, Chancellor), that the money, checks or bills deposited in a bank become the property of the bank; that there is an implied assent to this on the part of the depositor, and that the bank may issue bills and discount notes on the credit of such deposits.

Platt, Receiver, v. *Beebe*, 57 N. Y., 339.

The case is peculiarly applicable, because of the similarity of the principal facts to the facts in the cases at bar.

The suit was brought by the receiver of a national bank upon a note for $2,500, taken by the bank under

the following circumstances: The note was made by the defendant, Beebe, to the order of one Crawford, and delivered to him with instructions to procure it to be discounted and bring the proceeds to Beebe. Crawford took the note to the bank and indorsed it, and asked to have it discounted *for his own account.* The bank declined to discount it at that time, not being then in funds, but agreed to do so when they had the funds, and it was agreed meanwhile that Crawford might leave the note and draw against it, which he did. In pursuance of this agreement, Crawford had drawn against the note about $1,800.

Held, that the bank had become the owner of the note. The court says, however, that:

"If it was otherwise, and the note, left as it was, and drawn against, was a mere pledge for the sum paid upon the drafts, the note being commercial paper, the bank was not subject to the rule regulating the rights and liabilities of a pledgee, but is regarded as a holder for value."

Metropolitan Natl. Bank v. *Loyd*, 90 N. Y., 530.

Murray deposited a certain check in a Troy bank, and the bank gave credit to the depositor for the amount of the same.

Held, that the property in the check vested in the bank and that Murray could not have reclaimed it if it had remained in the hands of the bank. The court refers to a number of authorities sustaining this doctrine, amongst others to *National Bank* v. *Millard*, 10 Wall., 152, to which we also refer.

Brooks v. *Bigelow*, 142 Mass., 6.

Checks were deposited in a bank in New York and placed to the credit of a customer, under an agreement

with the bank that all checks drawn on banks in other places should be passed to his credit on the day of deposit, but, if returned unpaid, should be charged to his account.

Held, that the bank became the owner of the checks with the right to charge them back if it saw fit, in case the checks were not paid.

Bank v. *Miller*, 77 Ala., 168.

This case holds that checks deposited in the ordinary course of business by a general customer become the property of the bank.

Ayres v. *Farmers Bank*, 79 Mo., 421.

A check was deposited and placed to the credit of a customer. *Held*, that it was in effect a purchase of the paper.

Flannery v. *Coates*, 80 Mo., 444.

This case follows *Ayres* v. *Farmers Bank*, *supra*.

Titus v. *Bank*, 6 Vroom, 588.

Certain checks were deposited and placed to the credit of a customer as cash. The court says:

"They were received and credited in a cash account as cash, in part as payment of an overdraft, and in part to be drawn against. They were received and credited in the same way as bills or notes of other banks. By such crediting, the bank became the owner of these bills, as they do of legal tender notes or bank bills so deposited, and had the defendants failed the next day the plaintiffs could not have demanded these identical checks as their property, left for collection, against a receiver or an assignee in bankruptcy. The plaintiffs *had received the price of these checks by having it credited on their overdraft* and by drawing for it."

Terhune v. *Bank*, 7 Stew. Eq., 367.

Terhune deposited checks and cash. The whole was placed to his credit, and the checks were forwarded for

collection; and the bank's correspondent, to whom they were sent, credited the bank with the amount of the checks. Next day the bank suspended. *Held* that Terhune was not entitled to any preference, as the bank had become the owner of the checks.

Bank v. *Crawford*, 2 Cin. Sup. Ct., 125.

This case supports the same doctrine.

In re Carew's Estate, 31 Beav., 39.

This case is very pertinent, because of the similarity of the facts to some of the facts in the cases at bar.

A drew bills on B, which were accepted by the latter, although he received no consideration for his acceptance. B entrusted the bills to C, from whom A obtained them by fraud, and left them on deposit with his bankers. The bank placed the bills to the credit of A, but paid him no money therefor, his account being then overdrawn.

Held that the bank was a purchaser of the bills for value.

Ex parte Richdale, 19 Ch. Div., 409.

A drew a check on B, payable to C, who indorsed it to D. The latter deposited it in his own bank, and it was placed to his credit and afterward paid. The trustee in bankruptcy of A, the drawer, claimed the proceeds from the bank. *Held*, that he was not entitled to recover.

The court (JESSEL, *M. R.*), says:

"The bankers were the holders of the check for value. The moment they credited the amount of it to Alfred Palmer it became their property. Therefore, if the drawers had stopped the payment of the check on the 28th of April, still they could not have avoided payment of the amount to Alfred Palmer's bankers."

It was argued by counsel that it was the practice of bankers to return dishonored checks to their customers. But the court replied:

" They would sue on it, if the customer's account was over drawn."

It has been said by appellant's counsel that the fact that this bill of exchange was payable to the order of appellee was notice to appellee that Wilshire was not the purchaser or remitter of the bill.

To this we reply:

First. It is every day practice for a party purchasing a bill from a bank to have it drawn payable to the order of the party to whom the purchaser intends to forward it.

Second. The Fidelity bank stated to the American Exchange in its telegram of June 14th, that Wilshire would be at the American Exchange the next morning with $600,000 to make his trade with Kershaw and others good. When Wilshire came he had $600,000 issued by the Fidelity bank, *including* this bill, but only $500,000 *excluding* this bill. As a part of this $600,000 he also had a certificate of deposit issued by the Fidelity to the American Exchange saying, " Messrs. Wilshire, Eck-" ert & Co. have deposited two hundred thousand ($200,-" 000) dollars to your credit for the use of C. J. Kershaw " & Co."

Third. It was manifestly necessary to the end which Harper and Wilshire had in view that the American Exchange should be deceived into receiving this Fidelity bank paper as money which Wilshire was putting up to save his purchases from the panic.

It has also been claimed by appellant's counsel that the manner in which appellee acted after taking this bill on deposit shows that it is not a *bona fide* holder for value.

We have already stated what took place between the American Exchange, Wilshire and Kershaw & Co. when

the deposit of $400,000 was received, but have purposely reserved the facts to which appellant's counsel refer in order that they might be considered in this connection.

The two bills taken on deposit by appellee were drawn differently in this, one was payable to the order of C. J. Kershaw & Co., the other to the order of appellee. The assistant cashier noticed this difference, and feared the Fidelity bank might subsequently claim that the bill payable to the order of the American Exchange was a part of the $200,000 mentioned in the certificate of deposit. He therefore prepared and sent the following telegram:

"CHICAGO, 15 June, 1887.

Fidelity National Bank, Cincinnati, Ohio.

Your draft on New York, number sixteen four twelve, delivered us this morning, is made payable to our order. Why was this done, and is the amount charged against us or is it intended for use of W., as he may direct?

Answer quick.

AM. EX. NAT. BANK."

This telegram was sent as the cashier says only "as an "extra precaution." (Rec., 345.) Appellee was under no obligation to wait for a reply. It was at liberty to act upon the representations which the Fidelity bank had already made. In fact, as soon as the doors of the bank were opened, it was *compelled* to act. There was such a run upon the account of Kershaw & Co. that within an hour their account was exhausted and more than exhausted, it was overdrawn $60,958.39, and the bank was obliged to again stop payment of their checks.

This was two hours before any reply by wire was received from the Fidelity bank, notwithstanding it had been requested to "answer quick." But when the reply came it did not disavow the authority of Wilshire to use this bill as a part of the $600,000 with which to protect

his trades with Kershaw and others. The reply was as follows: (Rec., 54.)

"CINCINNATI, Ohio, June 15, 1887.

American Exchange National Bank, Chicago:

We want number sixteen four twelve to apply on your account, and have wired parties. Please send all drafts to us and order Cincinnati National to deliver one to-day. Party that controls special account out of city. Answer.

FIDELITY NATIONAL BANK."

From this telegram nothing could be inferred other than that this bill had been issued and given to Wilshire for his use, but that since it had been issued something had occurred which made the Fidelity bank wish to withdraw it if it could obtain the consent of the parties in interest to whom it had wired. The telegram which appellee's assistant cashier sent was sufficient to notify the Fidelity bank that Wilshire was using this draft as a part of the $600,000, and it gave the Fidelity bank an opportunity to "answer quick" that Wilshire had no right to use it in that way, if such were the fact.

There was nothing in the reply, if it had been received in time, to warn appellee not to place this draft to the credit of Kershaw & Co., nothing to discredit Wilshire's title to it.

The fact is that Mr. Harper, the vice-president of the Fidelity bank who sent this reply in the name of his bank, had no intention of discrediting Wilshire. He meant to have the trades with Kershaw & Co. protected, and if the $600,000 was needed for that purpose, he meant to have it so used. But if it was possible to accomplish his purpose and still withhold a part of the $600,000, that was what he wanted. He tried to do this first by telegraphing to Gahr under the name of A. P. Gordon (as we have seen), to keep back the certificate

for $200,000 if possible. Again when he received this telegram of inquiry from the American Exchange about this draft, he thought he saw an opportunity to withdraw that, so he telegraphed the American Exchange: "We "want number sixteen four twelve to apply on your ac- "count," and at the same time telegraphed Gahr to arrange, if possible, for this draft to be applied on the Fidelity's account. It was, however, too late, the draft had been placed to the credit of Kershaw & Co. and the funds paid out. Gahr knew it was too late, and did not undertake to accomplish anything of the kind.

The court will please note that although the Fidelity bank kept its doors open until June 21st it made no claim that this bill of exchange was not issued in good faith as part of the $600,000 for which Wilshire had paid. It did not claim that appellee had wrongly applied it to the credit of Kershaw & Co. Harper simply tried to rob appellee of it *vi et armis*. He "wanted to apply it on "appellee's account." No doubt he wanted to, but he did not have the hardihood to try to give any reason for so applying it.

While appellee was paying checks, the two drafts and the certificate of deposit were in the hands of the assistant cashier on the way in due course of business to be entered upon the books of the bank, and while they were in his hands he made out the following deposit ticket:

"AMERICAN EXCHANGE NATIONAL BANK, CHICAGO.

Deposited for account of C. J. Kershaw & Co., June 15, 1887.
Checks and drafts on other towns and cities:

Cincinnati	$200,000
" N. Y.	100,000
*Fidelity	100,000
	400,000
	800
	399,200

*Credited subject to advice from the Fidelity Nat. that draft is for Kershaw account. We have wired for advice."

This ticket was handed to the teller with the deposit before the note at the bottom was put on, but immediately afterwards the assistant cashier went back to the teller and added the note. (Rec., 68–9.)

Appellant's counsel are in error in saying that *this* deposit ticket was made out when the deposit was made. Mr. Wilshire, their own witness testified on this point as follows:

"I was shown a deposit ticket which gave credit on the books of the bank for $400,000 to C. J. Kershaw & Co. I saw the deposit ticket which was to give the credit.

Q. Who made out the deposit ticket? A. I am unable to say; it was shown by Mr. Dewar. I asked for a receipt, or for some paper to show me that the deposit had been made of the money; he then exhibited this deposit ticket to me, and said later he would give me a receipt, which he failed to do.

Q. Was there anything unusual about the deposit ticket? A. No, sir; nothing unusual; ordinary deposit ticket, such as they use in banks in general.

Q. How much did the deposit indicate C. J. Kershaw & Co. received credit for? A. Four hundred thousand dollars.

Q. Were there any conditions named in the deposit ticket? A. No, sir." (Rec. 83.)

* * * * *

"Q. State Mr. Wilshire, whether subsequently during the day, you had any conversation with Mr. Dewar, the cashier of the American Exchange Bank? A. I had; yes, sir.

Q. When and what was it? A. I spoke to him in relation

to a receipt that he had promised to give me; or a statement of the disposition that he made of this money.

Q. When was that? A. That was immediately after our interview, and immediately after I had turned over the money to them.

Q. Well, what was said then? A. He said before I left that he would give me a receipt, but he did not; and then before I left I spoke to him again, before I left the bank, which was about fifteen or twenty minutes after this; and he then exhibited to me a deposit ticket which showed that four hundred thousand dollars had been placed to the credit of C. J. Kershaw & Co. He said, 'I will give you either a copy of this, or some other form of receipt before you leave the city,' I said, 'Very well, I shall be in again; I have to go to C. J. Kershaw & Co.s office to attend to some business transactions; and I will return again and get the receipt for this." (Rec., 89–90.)

* * * * *

"Q. Were you shown this deposit slip before you left the bank, Mr. Wilshire? A. That is the time I had the conversation. My impression is that before I left, as I was going out at the railing, I turned and spoke to Mr. Dewar, the cashier, and I think it was then that he showed me this deposit slip.

Q. That deposit slip, you say, was in the ordinary form? A. Yes, sir.

Q. And showed that two of those drafts and the letter of advice had been placed to the credit of C. J. Kershaw & Co.? A. *It showed that four hundred thousand dollars had been placed to the credit of C. J. Kershaw & Co.* But it didn't show which of the drafts, or the letter of advice and drafts—

Q. Well, you knew that it was made up in that way, didn't you? A. No, there was nothing on the deposit slip to show that.

Q. But you knew, Mr. Wilshire, that Mr. Irwin had taken two of the drafts? A. Yes, I knew that.

Q. Then you knew, did you not, that the four hundred thousand dollars must have been made up of two remaining drafts and the letter of advice for two hundred thousand dollars? A. I had no way of knowing that.

Q. Could it be otherwise, Mr. Wilshire? A. Well, I don't know; I suppose not.

Q. When you went away from the bank, Mr. Wilshire, you knew that the American Exchange National Bank had taken this letter of advice and had credited it to C. J. Kershaw & Co. as a cash item; this letter of advice for two hundred thousand dollars, which you knew to be false? A. I knew that they had taken it; *I knew that they had placed $400,000 to the credit of C. J. Kershaw & Co. of the papers I have already enumerated as being in that envelope.*" (Rec., 113, 114.)

* * * * *

Appellee's counsel then handed the witness the ticket made out by the assistant cashier and examined him in reference to the same, as follows:

"Q. Will you look at the deposit ticket I now hand you, Mr. Wilshire, which is Exhibit No. '69' of the deposition of Robert M. Orr, and state whether or not that is the deposit ticket which was shown you by Mr. Dewar on the 15th of June? A. (After examining.) No, sir; that is not the ticket." (Rec., 118.)

Upon re-examination by appellant's counsel upon the same matter witness testified as follows:

"Q. Now, here is the deposit ticket, marked Exhibit '69,' which Mr. Swift has shown you, and which you have stated is not the deposit ticket shown you by Mr. Dewar, the cashier of the bank. Now, will you please take this ticket and tell me how it differs from the one shown you by Mr. Dewar, if at all. And state how you are able to state that this is not the one? A. Well, there was no writing on the deposit ticket that I saw, except the mere name of C. J. Kershaw & Co. and the date, the 15th of June, and the figures $400,000. This ticket has some writing here (indicating) which seems to be a contract or a statement.

Q. Some writing following a * and beginning with the word 'credited'? A. Yes, sir.

Q. Do you say that that was not on the deposit ticket showed you? A. Yes, sir, that was not on.

Q. Was it otherwise similar to this ticket? A. Well, the amount was for $400,000, and this amount differs from that; this gives the items." (Rec., 128, 129.)

Appellee's assistant cashier, Mr. Orr, was examined by appellant's counsel about this deposit ticket which he made out, and testified as follows:

"Q. Did you make the deposit slips for the credit to Kershaw's account of the $399,200?

A. I did.

Q. Were there two made?

A. Not that I know of.

Q. I will ask you to refresh your memory, and see whether or not there was not a change made in the deposit tickets during that day?

A. No change whatever made.

Q. Will you be kind enough to produce the deposit ticket? A. (Witness produces the deposit ticket.)

Q. At what time in the day was this deposit slip made out by you?

A. I cannot say what hour; some time during the forenoon of the 15th of June.

Q. Was it originally made out as it is now, with the condition written at the bottom of it, or was that added at a subsequent time?

A. The deposit slip was made out first, and I took it forward to the teller, and immediately after I went back to the teller before the entry had been passed by him, and wrote that on."

Counsel for defendant offered said deposit ticket in evidence, and the same is marked Exhibit "69," and is as follows:

(Here follows the deposit ticket above shown.)

"Q. Did you get any memorandum or slip of any kind, or did you see any made by any other officer or person in the bank?

A. No, sir." (Rec., 68–69.)

It is evident, from this testimony, that the cashier made out a deposit ticket, when the deposit was taken, showing one item of $400,000 deposited by C. J. Kershaw & Co., and this was the ticket which Wilshire saw. This was the ticket made at the request of Kershaw & Co. when they handed the deposit to the cashier and said "Place it "to our credit." (Rec., 389.)

What became of this deposit ticket does not appear. It would seem, from the evidence of the assistant cashier, that it did not come into his hands. He made out the ticket which has been introduced in evidence. But there is no evidence tending to show that this deposit ticket was ever seen or assented to by C. J. Kershaw & Co. or by Wilshire.

On the contrary, appellee's cashier testifies, expresssly that Kershaw & Co. did not know that the bank had not placed the deposit at once to their credit on the books of

the bank, although they did know of the telegram appellee had sent the Fidelity bank.

The cashier testified as follows:

"Q. Did Kershaw & Co. know, so far as you know, that the bank was telegraphing in reference to any of this paper, except in reference to the one draft of $100,000 made to the order of the bank?

A. I think they did, sir.

Q. Did they know whether or not the deposit had been placed to their credit?

A. They could not have known.

Q. As to the fact, simply, did they know?

A. They did not know it had been placed to their credit.' (Rec., 323.)

The last answer is explained and corrected, as follows:

"Q. It seems, Mr. Dewar, I did not correctly understand an answer to one question that was put upon the direct examination which I will repeat; I asked you, and I ask again, whether, during the time that the American Exchange was certifying and paying checks of Kershaw & Co., on the morning of the 15th of June, and before the two drafts and letter of advice had been placed to the credit of Kershaw & Co. on the books of the bank, Kershaw & Co. themselves knew that the drafts and letter of advice had not been placed to their credit; will you answer the question now, please?

A. They did not know." (Rec., 357.)

We think it is clear that this deposit ticket made out by appellee's assistant cashier, was made for the use of the bank itself, and that it did not in any way change the terms of the deposit as between the bank and Kershaw & Co. It was a private memorandum, made by the assistant cashier for the guidance of the paying teller.

The credit on the books of the bank was not made in accordance with the terms of this ticket. It differed from the ticket in two material particulars: the credit was in *one item*, $399,200, and it was *unconditional.* The note at the bottom of this ticket was not carried into the books.

The following is a transcript of all the entries upon appellee's books showing these transactions:

"JUNE, 1887. WEDNESDAY, 15.

NAMES.	BALANCE.	DEPOSITS.	SPINDLE.	TOTAL CHECKS.	BALANCE
			13,135.35		
		25,249.40 A. M.	9		
		399,200	25		
Kershaw,		~~40,995~~	1		
C. J. & Co.		100,000 P. M.	17	256,878.18	
	11,401.17		889.48	339.930.78	60,958.39
			2,2		
			15		
			65		
			7,335.57		
			14,337,50		
			137.50		
			5		
			20		
			4,583,48		
			6,509.27		
			8,749,92		
			25,456 25		
			5		
			1		
			795.69		
			17,542		
			15,083.24		
			4,905.43		
			3,120.78		
			10		
			26		
			3,5		
			3,175.82		
			2,115		
			232.50		
			100		
			15		

Note. We show the above transcript of appellee's ledger under a stipulation between counsel which permits the use of the books of account of either party at any stage of the litigation whether made part of the record or not. (Rec., 310.)

Appellant's counsel had this book produced by appellee's assistant cashier, and examined him upon the credits.

The evidence is as follows:

"Q. I want you to show me the entries, all of them, that there are of any kind upon the bank's books, in reference to that item of $399,200?"

A recess was taken to 2 o'clock P. M.

Parties reassembled at 2 o'clock P. M.

"The witness produced the individual ledger showing the account of C. J. Kershaw & Co., Wednesday, June 15, 1887.

Q. Read the items in the deposit column?

A. In the deposit column there is a deposit of $25,249.40; a deposit of $399,200; $49,925, which is scored through; $100,000.

Q. You did not mention the last item of $100,000 in your testimony of yesterday; what did that consist of?

A. A reversal entry.

Q. What was the original entry?

A. The original entry was the check charge of $100,000 and the redeposit to Kershaw's credit.

Q. Whose check?

A. C. J. Kershaw & Co.'s check.

Q. On this bank?

A. On this bank.

Q. Of what date?

A. The 15th of June.

Q. What was the $49,925 that is scored out?

A. I don't know anything about that; it is evidently a book-keeper's misentry, and was scored out." (Rec., 69–70.)

The item of $100,000 upon each side of the account has no connection with the bill of exchange. This item was a check which C. J. Kershaw & Co. had certified about 11 o'clock. They finally decided not to use it, and gave it back with their own check for the same amount as the bank's voucher for the cross-entry. (Rec., 324.)

The credit was given upon the books as above, without any further conversation or conference with C. J. Kershaw & Co. (Rec., 326, 349.)

The latter part of this reply telegram from the Fidelity bank needs explanation, and may as well be explained here. It reads as follows:

"Please send all drafts to us, and order Cincinnati National to deliver one to-day. Party that controls special account out of city."

On June 14th Irwin, Green & Co. had deposited with the American Exchange a draft upon the fidelity for $217,862.50, which appellee sent to the Cincinnati National Bank for collection. It was presented on the 15th, and the Fidelity bank refused to pay, alleging that the deposit against which the draft was drawn had not been made. This was extraordinary, as Irwin, Green & Co. held a certificate of deposit issued by the Fidelity bank, and their draft was drawn against that deposit. The party who controlled the special deposit was "out of the city," but he was in Chicago, and said the draft was all right and ought to be paid. (Rec., 59–60.)

This reply telegram also contained the strange request that the American Exchange should order the Cincinnati National to turn over to it, *without payment*, this draft for $217,862.50 (Rec., 54), and should send all drafts upon the Fidelity bank directly to it.

This was the end of appellee's confidence in the Fidelity bank.

The next day (June 16th) four telegrams passed between Wilshire and appellee, which we give. They are very satisfactory evidence that appellee did not suspect Wilshire had any connection with the Fidelity bank or its officers. The first is as follows:

"CINCINNATI, Ohio, 6/16, 1887.

"*Am. Ex. Bank:*

After yesterday's understanding Kershaw must be protected to-day. Should this be done, all is well; if not, fear trouble to all.

WILSHIRE."

To which the bank sent the following reply (Rec., 65).

"CHICAGO, June 17, 1887.

Wilshire, Cincinnati, Ohio:

Do not admit any understanding, but if you will deposit three hundred thousand to the credit of this bank, with the *First National Bank, Cincinnati*, and have that bank wire to their correspondent here by cipher that this has been done, and to advise us, and also have Chemical, New York, telegraph us through Am. Ex. Nat. Bank that the drafts for two hundred thousand which will be presented by Am. Ex. Nat. Bank for our account and use of Kershaw will be paid, we will protect Kershaw up to four hundred thousand dollars. He claims three hundred thousand will see him through."

After sending this message (June 16th) the American Exchange received from the Fidelity bank the following letter:

"CINCINNATI, June 15, 1887.

American Exchange National Bank, Chicago, Illinois.

GENTLEMEN: We charge your account $100,000 New York Exchange to your order sent you by message to-day.

Respectfully yours.

(Rec., 58.) E. L. HARPER, *V. P.*"

And, thereupon, the American Exchange sent Mr. Wilshire the following telegram (Rec., 65):

"JUNE 16, 1887.

Wilshire, Cincinnati:

Fidelity advises us this morning by letter that they have charged to our account New York Exchange for one hundred thousand, payable to our order and left with us by you yesterday. This must be reversed and Chemical instructed to wire us they will pay same. Also Fidelity must wire us direct that they have reversed the charge, and authorize us to use this item for Kershaw. Otherwise you must deposit four hundred thousand instead of three hundred thousand in the bank we have already designated. Rush.

AMERICAN EXCHANGE NATIONAL BANK."

To which Mr. Wilshire replied as follows (Rec., 66):

"CINCINNATI, 16.

To American Exchange Natl. Bank:

Your telegram received at eleven three. Will go to work at once and arrange matter, but you must see Kershaw through without fail. You should have wired us sooner and would have fixed you up as desired.

J. W. WILSHIRE."

The second telegram to Wilshire shows simply that appellee was determined to avoid trouble over this draft No. 16,412 which it had credited to Kershaw & Co., but which the Fidelity bank had charged to appellee.

Wilshire left Chicago the night of June 15th, knowing the exact condition of things with Kershaw & Co. and the American Exchange. He reported to Harper the next morning, and at the very time Wilshire was sending these telegrams of June 16th he and Harper were arranging to further defraud appellee by stopping payment of the drafts which Wilshire took to Chicago. They telegraphed the Chemical bank not to pay, and when the four drafts were presented to it the next day it did refuse to pay.

Harper and Hopkins then (*June 16th*) charged this draft No. 16,412 to appellee on the books of the Fidelity bank, but they fraudulently entered it in the transactions of *June 15th and changed the footings* of the column in which the entry was made.

But for this change the books of the two banks would have substantially agreed, and the books of the Fidelity bank (as well as those of appellee) would have shown that it owed appellee the amount of the decree rendered by the Circuit court on the certificate of deposit. The drafts were not, of course, charged to appellee.

When appellee replied to the Fidelity bank's telegram of June 14th, it suggested that Wilshire should bring the $600,000 in currency. Harper sent it in paper. Why was this? Was it because he could thus make appellee pay out its currency and then stop payment of the paper if the panic in wheat was not stayed? This was what he did.

Did he mean to get appellee where it would be com-

pelled to advance its own money to sustain Kershaw & Co.? If so, he did not succeed, for appellee stoppped paying checks as soon as the deposit was exhausted.

But appellee did fall into this trap so far as to treat the Fidelity bank paper as *money*, and that is what brings it here.

Counsel for appellant have endeavored to show that appellee took this bill as collateral security and therefore is not a *bona fide* holder.

To this we reply as follows:

First. Appellee took this deposit not for collection, but as a cash deposit. There was no agreement with the depositor that the deposit should be held only as security.

After the deposit was taken appellee telegraphed the Fidelity bank as has been shown. It also telegraphed to New York to see if the Chemical Bank would pay the two bills when presented. Meanwhile appellee was paying checks against the deposit of $400,000 Fidelity bank paper, and in a limited sense it may be said that the paper was security for the payments which were being made; that is, appellee was paying on the security of and in reliance upon the promises of the Fidelity bank and not from actual money.

The reply to the New York telegram was that the drawee could not engage to pay unless funds were in hand when the drafts were presented. This reply was just what might have been expected. It was not received until about 2 o'clock. The reply from Cincinnati was not received until after 1 o'clock. At 11 o'clock the deposit had been placed to the credit of Kershaw & Co., and had been used up.

Appellee's cashier, somewhat nettled by a persistent cross-examination, designed to show that appellee took this paper only as collateral security, summed up his previous answers briefly in the following reply (Rec., 349):

"I simply state it this way: that this paper was handed to me by my brotner, and to all intents and purposes he understood I would pay his checks through the clearings when he delivered that paper to me. I did not say I would pay it, nor I did not say what I would pay, or how much I would pay, what checks I would pay, or what I would do with the paper, and I held the paper there. It might be considered as collateral security, or whatever you choose to call it. I simply held the paper there until we had received advices from New York and Cincinnati. We commenced immediately to pay the checks at 10 o'clock. We paid more than Kershaw understood we should pay, and when this $200,000 check was presented we stopped paying, and to the best of my knowledge the drafts were then, before we received any telegram from New York or Cincinnati, placed to the credit of C. J. Kershaw & Co., the two $100,000 drafts, and the $200,000 certificate of deposit. That is all the explanation I can make, and all the explanation I want to make in reference to it."

Kershaw & Co. had estimated in the morning that $218,000 would carry them through the day; $68,000 to pay their balances through the Board of Trade Clearing House to other members of the board, and $150,000 for other purposes. At 11 o'clock they asked appellee to certify a check for $200,000, instead of $68,000, and they had already drawn $239,000 instead of $150,000. It is this check for $200,000 to which the cashier refers in the above answer. All the testimony agrees that the full deposit was credited as cash on appellee's books at or about 11 o'clock.

Second. So far as appellee's right to recover the full amount of this bill is concerned it is immaterial whether it was taken for deposit as a cash item or as collateral security, inasmuch as appellee paid Kershaw & Co.'s checks on the faith of it. We think appellant's counsel

must have come to agree with us about this since the hearing in the Circuit court, otherwise they would have appealed from the decree in our favor on the other draft for $100,000.

If we have stated our position and facts clearly, we think the following conclusions must be drawn:

First. The Fidelity National Bank represented to appellee that Wilshire was a *bona fide* holder of bill of Exchange No. 16,412 for his use in making good his trades with Kershaw & Co.

Second. Appellee, relying on said representations, took said bill on deposit from Kershaw & Co., placed it to their credit and paid their checks.

Third. Under these circumstances, the Fidelity National Bank would be estopped from showing that Wilshire was not a *bona fide* holder of the bill, and appellant stands in no better position.

II.

CASE NUMBER 1111.

The bill in this case sets up that on June 14, 1887, the Fidelity National Bank issued a certain certificate of deposit addressed to appellee, of which the following is a true copy:

"THE FIDELITY NATIONAL BANK.

"Capital, $2,000,000.00. Surplus, $400,000.00.

CINCINNATI, June 14th, 1887.

"*The American Exchange National Bank, Chicago, Illinois.*

"GENTLEMEN: Messrs. Wilshire, Eckert & Co. have deposited two hundred thousand ($200,000.00) dollars to your credit, for the use of C. J. Kershaw & Co.

"Respectfully yours,

"BENJ. E. HOPKINS, *As. Cas.*"

That upon the faith of this certificate of deposit, appellee, upon June 15th, paid to said C. J. Kershaw & Co., and upon their orders, $200,000, and thereby became entitled to recover that sum from said Fidelity National Bank; that upon June 18th, the same was presented to the Fidelity National Bank for payment, and said bank refused to pay the same or any part thereof.

Certain collections afterwards made by appellee for the Fidelity National Bank, and mentioned in the bill, reduced the claim to $198,697.23. (Agreed Rec., Appeal No. 1,111, p. 22.)

The paper upon which this suit is based is called by various names in the testimony; sometimes a "certificate "of deposit;" sometimes a "letter of credit," and sometimes a "letter of advice." We have spoken of it throughout this brief as a certificate of deposit, because we think this is the *legal character* of the instrument.

Certificates of deposit are in various forms; sometimes they fix a date at which, or limit of time within which payment is to be made; sometimes they provide for the payment of interest; and they usually provide for a demand and return of the certificate of deposit upon payment. But neither of these features is essential. The name of the instrument itself indicates truly what it is, viz: a written statement by a bank that it has received on deposit a certain sum of money for the account of some party named in the instrument.

Mr. Morse defines a certificate of deposit as "*the writ-*"*ten acknowledgment of the bank that it has received from*"*a certain person a certain sum on deposit.*"

Morse on Banks and Banking, 63.

The following instruments have been held to be certificates of deposit:

"This certifies that the Life Association of the South has on deposit with me the sum of $1,723.45, in currency.

H. C. HART,
President and Treasurer Local Board of Trustees."

Hart v. *Life Association*, 54 Ala., 495.

"Received of Joseph S. Long sixteen hundred dollars on deposit, in national currency.

STRAUS BROS.

Ligonier, April 27, 1865."

Long v. *Straus et al.*, 107 Ind., 94.

The obligation of a bank to its depositor is well settled. It is an obligation to pay to the depositor, or his order, the sum to his credit on demand. In Morse on Banks and Banking (p. 35) the author says:

"The bank is under the obligation of honoring the customer's drafts and checks whenever the same are presented for payment, provided that at the time of such presentment the balance of the account, if then struck, would show a credit in favor of the customer of funds on which the bank has no lien, sufficient to meet the sum called for by the check or draft. The contract so to honor the depositor's orders is implied from the usual course of business. The deposit is made with the tacit understanding that the bank shall respond to the depositor's orders, so long as there is sufficient balance to his credit."

The instrument we are discussing is not a simple notification from the Fidelity National Bank to the American Exchange, that the former bank has received the sum of $200,000 on deposit to the credit of the latter bank. It entirely fails to carry out the intention of the parties, if it does not also, by necessary implication, contain a promise by the Fidelity National Bank that it *will pay $200,000 to the American Exchange, on demand, for the use of C. J. Kershaw & Co.*

Mr. JUSTICE CLIFFORD says:

"Undoubtedly, necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed."

Del. and Hudson Canal Co. v. *Penna. Coal Co.*, 8 Wall., 276.

In the case of *Long* v. *Straus, supra*, which is by far the ablest case upon this subject which we have seen, the court, in reaching the conclusion that the instrument in suit was a certificate of deposit, uses the following clear and convincing language:

"Into the contract before us the law enters and makes it an agreement to repay the money received on deposit. As the contract is a written one, not subject to variation by parol evidence, the agreement to repay the money must exist in it or not exist at all, and usually no just man would assert that one who receives money on deposit, and so states in a written contract, does not undertake to repay it. If he undertakes at all, he does so by his written contract, for there is and can be no other contract, as all oral negotiations and stipulations are merged in the writing."

* * * * *

"We do not regard the promise as an independent one, existing outside of the written contract, but as a promise forming one of the terms of the contract. In short, we look upon it as a part of the contract, put there by law, for the parties are presumed to have contracted with reference to the law. The principle on which we proceed is thus stated by Mr. Bishop, 'What is *implied* in an express contract, is as much a part of it as what is *expressed*.' Bishop Cont., Sec. 121."

Mr. Justice BLECKLEY, of the Supreme court of Georgia, expresses his views about certificates of deposit as follows:

"What is a certificate of general deposit issued by a bank? Is it not an acknowledgment of the bank that it has received a loan of money from the depositor, coupled with a promise, *implied*, if none be *expressed*, that it will repay the loan, at the bank, upon actual demand or call, if no particular time or place be specified? Does not the known course of business require this suggestion, and does not the nature of the transaction suggest it?" (*Lynch* v. *Goldsmith*, 64 Ga., 50.)

This instrument has, in the course of taking the testimony, been sometimes called a letter of credit, but it is clear, we think, that this is not a proper designation. A

letter of credit issued by a bank is a request upon another bank to give credit to the holder of the letter up to a certain sum named, and the bank issuing the letter agrees to pay any advances made on the faith of the letter, by the bank to which the letter is addressed.

Story on Bills, § 459.
Daniel on Negotiable Instruments, Vol. 2, 800, § 1,790.
Randolph on Commercial Paper, Vol. 1, § 10.

The relation of debtor and creditor is not created between the two banks by the issue of a letter of credit. That relation does not arise until some advance is made on the faith of the letter, and it then exists only to the extent of the advance made.

In this case the Fidelity Bank *at once* charged Wilshire, Eckert & Co. with the $200,000, and credited the American Exchange with the full amount; and the American Exchange, without giving any credit, or making any advance to C. J. Kershaw & Co., might have drawn its draft upon the Fidelity for $200,000, in favor of C. J. Kershaw & Co., and the Fidelity Bank would have been under obligations to pay the same.

As for the term "letter of advice," it could with equal propriety be used to designate a letter of credit, a certificate of deposit, issued to any party to whose credit some third party had made a deposit, or any letter containing information material to the party addressed. It is a term unknown to the law.

We think, therefore, we are correct in designating this instrument as a certificate of deposit.

But certificates of deposit are now generally admitted to be nothing more nor less than promissory notes.

Parsons on Notes and Bills, Vol. 1, 26.
Morse on Banks and Banking, 63–4.
Miller v. *Austen*, 13 How., 218.
Curtis v. *Leavitt*, 15 N. Y., 92.
Leavitt v. *Palmer*, 3 Comst., 34.
Barnes v. *Ontario Bank*, 19 N. Y., 152.
Bank of Orleans v. *Merrill*, 2 Hill, 295.
Bank of Peru v. *Farnsworth*, 18 Ill., 563.
Laughlin v. *Marshall*, 19 Ill., 390.
Hunt v. *Divine*, 37 Ill., 137.
White v. *Franklin Bank*, 22 Pick., 181.
Hart v. *Life Association*, 54 Ala., 495.
Kilgore v. *Bulkley*, 14 Conn., 362.
Lindsay v. *McClelland*, 18 Wis., 481.
Bank of Chillicothe v. *Dodge*, 8 Barb., 233.
Poorman v. *Mills*, 35 Cal., 118.
Hazleton v. *Union Bank*, 32 Wis., 51.
Tripp v. *Conzenius*, 36 Mich., 494.
Bean v. *Biggs*, 1 Iowa, 488.
Howe v. *Hartness*, 11 Ohio State, 449.

In the last case cited the instrument sued upon was in the following words and figures:

"HARTNESS, HILL & CO., BANKERS.

CLEVELAND, Ohio, May 12, 1856.

F. C. Markham has deposited in this bank four thousand dollars in currency, payable in like funds, to the order hereon, of himself, with ints.

HARTNESS, HILL & CO."

This document was held to be a certificate of deposit and a promissory note.

In *White* v. *Franklin Bank*, *supra*, the plaintiff deposited with the defendant the sum of $2,000, and received from defendant a book containing the following words and figures:

"Dr. Franklin Bank, in accouut with B. F. White. Cr.
1887. Feb. 10th, To cash deposited ..... $2,000.
The above deposit to remain until the 10th day of August.
E. F. BUNNELL,
Cashr.'

The court says:

"The agreement that the deposit should remain until the 10th day of August, amounts in law, by the obvious construction and meaning of it, to a promise to pay on that day."

In *Long* v. *Straus*, *supra*, the court says:

"If the instrument we have under consideration had been written out in full, although payable on demand, it would be a promissory note, and it seems, under the principles we have stated, that it is a promissory note, and as such negotiable, for it is *well* settled that no precise form of words is necessary to constitute a promissory note, as any form that expresses a promise, although not in direct terms, will be sufficient."

If we add to the instrument we are now considering the words "payable on demand," it becomes, without doubt, a promissory note; and these words are by *necessary implication* a part of the instrument.

A promissory note usually contains an *express* promise to pay, but if the words which are written necessarily *imply* a promise to pay, the instrument may be a promissory note without an *express* promise, inasmuch as "necessary implication is as much a part of an instrument "as if that which is so implied was plainly expressed."

As Mr. Byles says:

"No precise words of contract are necessary, provided they amount in *legal effect* to a promise to pay."

Byles on Bills, 8.

The following authorities are to the same effect:

Cummings v. *Gassett*, 19 Vt., 308.
Franklin v. *Marsh*, 6 N. H., 364.
Hussey v. *Winslow*, 59 Me., 170.
Fleming v. *Burge*, 6 Ala., 373.
Blood v. *Northrup*, 1 Kan., 28.
Finney v. *Shirley*, 7 Mo., 42.

A promissory note usually contains the words "value "received," but the consideration may be recited *in full* without changing the legal character of the instrument or impairing its negotiability.

Randolph on Commercial Paper, Vol. 1, Sec. 180.

"A full statement of the consideration of a negotiable instrument does not affect its negotiability."

Again, in the same volume (Sec. 203), the author says:

"The recital of an executed consideration, however full, will not destroy the character of the paper as a note."

Leavitt v. *Palmer*, 3 Comst., 35.

The court says:

"A promissory note imports a consideration, and none need be mentioned. But though a consideration be mentioned in a written promise to pay money, whether it be done in general terms, as by the words, 'for value received,' or by specifying the kind of value, as *a deposit of money*, it is still a promissory note."

The fact that this instrument contains the words "for "the use of C. J. Kershaw & Co.," does not change its legal character. This was settled by the case of *Miller* v. *Austen*, *supra*, and, therefore, requires no discussion here.

The Fidelity National Bank itself entered this instrument upon its books as a check. See the following evidence given by a witness for appellant, a book-keeper who had been in the employ of the bank and was retained by the receiver.

"Q. Now, Mr. Watters, take the $200,000 transaction and show us the original entries in regard to that? A. In the National Bank Mail Credits, No. 3, '87, under date of June 16th, this entry goes from the charge ticket to the credit of the American Exchange National Bank, $200,000. This entry is in the handwriting of Mr. Edward Lucius. This ticket would say, credit American Exchange National Bank of Chicago, and charge Wilshire, Eckert & Co. That ticket would go to Mr. Lucius first, and then from the general book-keepers (to get their pay for it), it would go to the receiving teller, who would credit it to the general book-keepers; then he would charge it to the account of Wilshire, Eckert & Co., over here. (Indicating.) In General Scratcher, No. 2, under date of June 16th, the receiving teller credited the general book-keepers, $200,000, marked with a *, which indicated 'check on the Fidelity National Bank'; that is our mark. On the same date, on the debit side, the receiving teller has charged out to the individual book-keepers under their column, 'Item, $200,000.' The charge check then went to the individual book-keepers, who, in Check Book, No. 3, L to Z, charged the account of Wilshire, Eckert & Co., $200,000. That is all the original entries." (Rec., 170–1.)

This instrument is commercial paper.

Ordinarily the terms "commercial paper," and "negotiable paper," are used as synonymous, but negotiability is not the infallible test of commercial paper. A promissory note made by A to B, and endorsed by C, is commercial paper, although it is not negotiable, except in states where it is made negotiable by express statute. The same is true of a bill of exchange. But notes and bills of exchange, whether negotiable or not, are always recognized as commercial paper.

Mr. Randolph says:

"Commercial paper, is rather a popular than a technical expression, often used, however, both in statutes and in decisions of courts to designate those simple forms of contract long recognized in the world's commerce and governed by the law merchant. This *lex mercatoria*, or common law of merchants, is of more universal authority than the common law of England. It applies, in general, to bills of exchange, promissory notes, checks, bank-bills and letters of credit. And in more recent times its principles have been extended, in part at least, to other evidence of indebtedness, such as due-bills, *certificates of deposit* and corporation bonds.

These instruments may be *negotiable*, in the legal sense of the term, or *non-negotiable*." (Randolph on Commercial Paper, Vol. 1, Secs. 1, 2.)

Certificates of deposit, like promissory notes, are sometimes negotiable and sometimes non-negotiable.

Morse on Banks and Banking, 65.

This instrument is commercial paper of a high order. It is the paper of a bank. It is entitled to the same credit as bank-notes issued by the Fidelity Bank, except that the law requires a deposit to secure circulation. The mercantile community treat all paper issued by a bank in good standing as money. This paper was issued to be used as *money*. The Fidelity Bank telegraphed appellee that Wilshire would come with "six hundred thousand "*dollars*." In this paper which he brought, the Fidelity Bank stated that he had deposited "two hundred thous-"and *dollars*." The Fidelity Bank intended appellee should take this paper as *money*. If it would not do so the whole business would come to naught. Appellee did take the paper as *money*. The Fidelity Bank entered this paper upon its own books as being its own check upon itself.

Mr. Morse says further, in reference to certificates of deposit:

"Usually they embody an express promise, in terms, to pay; but even if they do not, they are yet the bank's *acknowledgment of its indebtedness*, and so are of *nearly the same effect as if they expressly promised payment.*" (Morse on Banks and Banking, 63, 64.)

Construing this paper in the light of all the circumstances under which it was issued, we think its legal status is that of a certificate of deposit.

Mr. Wilshire came to appellee on the morning of June 15th, as the purchaser and controller of this certificate of deposit, in like manner as he came as the purchaser and controller of the bill of exchange. He deposited (according to the statement in the certificate) $200,000 with the Fidelity National Bank, and it issued this certificate of deposit therefor, but at his request it issued it directly to appellee instead of to Wilshire.

All that we have said, therefore, in reference to appellee's claim as the holder of the bill of exchange, applies with full force to its claim as the holder of this certificate of deposit. It is a *purchaser*, and an *innocent* purchaser of both pieces of paper for *value*.

There is no question of negotiability in this case, because suit is brought by the original payee. And no question is made but that all the paper was applied by appellee for the use of C. J. Kershaw & Co.

Appellant's counsel will, however, contend that this paper is not a certificate of deposit, and will claim that it is a mere representation.

But if this paper is not a certificate of deposit, it is certainly more than a mere representation. When a bank accepts money on deposit it agrees to pay the depositor's checks to the extent of the deposit. The bank's obligation may be evidenced by a certificate of de-

posit, by an entry in a pass-book or by no writing at all. But the acceptance of the deposit, however evidenced, is the making of a contract.

As soon as this paper was delivered to and accepted by appellee the Fidelity National Bank had entered into a *contract* with appellee to pay it $200,000.

If this paper is itself a contract, as we think it is, then we submit that it must be, however informal, a certificate of deposit. If it is not itself a contract it is at least evidence of a contract, and this suit is brought upon contract. It is not an action for deceit. We sue for the amount the Fidelity National Bank agreed to pay and not for the damage appellee has sustained through the misrepresentations of that bank.

Appellee accepted this contract in good faith by placing $200,000 to the credit of C. J. Kershaw & Co. It also charged $200,000 to the Fidelity National Bank, and notified that bank it had done so.

The Fidelity National Bank acted on this contract after it was notified of its acceptance by appellee by placing $200,000 to the credit of appellee and charging that amount to Wilshire, Eckert & Co. (Rec., 170, 171.)

Appellee was not required to pay the Fidelity National Bank anything for this contract. That bank represented that Wilshire, Eckert & Co. had paid for the contract. Appellee was required, if it accepted the contract, to give the benefit of it to C. J. Kershaw & Co. This it did by at once giving Kershaw & Co. credit for $200,000. And that amount still stands to the credit of C. J. Kershaw & Co. on appellee's books.

Appellant now seeks to escape the consequences of the contract of the Fidelity National Bank by saying that its

statement that it had received the consideration for the contract from Wilshire, Eckert & Co. was false. We reply that he is estopped from setting up for his protection the falsity of this statement after appellee has acted upon it. This would be to allow the Fidelity National Bank to escape from its contract by its fraud.

It does not follow from our position that we are seeking to recover upon a false representation. We are seeking to recover upon a contract, and appellant is defending by setting up his (the Fidelity bank's) false representation.

Appellant's counsel will, however, probably claim that this paper is not a certificate of deposit, and, therefore, it is not necessary for appellant to show that appellee was guilty of *mala fides*, in taking it; and will claim that appellee took this paper under circumstances which would put a man of ordinary prudence upon inquiry, and that such inquiry would have led to the information that the statement in this paper, that Wilshire's firm had deposited $200,000 with the Fidelity bank, was false.

For the sake of the argument we now assume that this paper is not a certificate of deposit. We, therefore, proceed to the discussion of appellant's claim, that appellee took this paper under such circumstances as would put a man of ordinary prudence upon inquiry.

The Fidelity bank had prior to June 14, 1887, notified appellee of four deposits made with it by Wilshire's firm for the use of C. J. Kershaw & Co., April 28, 1887, $25,000; April 29, $25,000; April 30, $100,000; May 2, $100,000. For each of these deposits the Fidelity bank had issued paper similar to that we are now considering; the amounts were placed to the credit of Kershaw & Co.

by appellee and paid by the Fidelity bank to appellee in due course of business. Nothing passed between the two banks to indicate that the Fidelity bank knew what Wilshire was doing with his money until in the afternoon of June 14th appellee received the telegram from the Fidelity bank saying "Joseph Wilshire will be at your bank "to-morrow morning with six hundred thousand dollars "to make his trade with Kershaw and others good if they "are protected until he arrives."

Appellee was banker for Kershaw & Co., and had stopped payment of their checks that day. Kershaw & Co. were Wilshire's brokers and had bought a large quantity of wheat for him for future delivery, which needed immediate protection by deposit of margins because of the panic. The Fidelity bank was Wilshire's banker in Cincinnati, and the two banks were regular correspondents.

What could be more natural than that Wilshire should ask his banker to send this telegram to Kershaw & Co.'s banker?

There was surely nothing in this to put an ordinarily prudent broker on inquiry.

Appellee's cashier understood, as his acts show, that the two banks were carrying on this telegraphic correspondence solely for the benefit of their respective customers. It led appellee to expect that Wilshire would be at its bank the next morning with $600,000 of *his own money* to use in making good *his* trades with Kershaw and others.

What was the original telegram a representation of? Could it have been, by any possibility, understood by appellee to mean that Wilshire would be in Chicago with

$600,000 of the Fidelity bank's money, to make good his trades, which were for the Fidelity bank? Certainly not. No such construction can be put upon it by any amount of straining. The previous course of business negatives that idea. The dispatch itself negatives the idea. It was plainly and palpably a representation that Wilshire would be in Chicago with $600,000 of *his own* money. A representation on the 14th that Wilshire would be up with $600,000 of his own money, and his appearance the next morning with that identical amount, no matter how the papers were drawn, would lead appellee to believe that it was his own money, and the identical money spoken of the day before.

There was nothing in the paper which Wilshire brought to awaken suspicion. There were four drafts for $100,000 each, one payable to the order of Wilshire, Eckert & Co., one to the order of J. W. Wilshire, one to the order of C. J. Kershaw & Co., and one to the order of appellee, and this paper for $200,000 which we are now discussing. This was all in proper form to be controlled by Wilshire, and used by him to protect his trades with "Kershaw and others." What was there about it to make appellee suspect it was money of the Fidelity Bank? Nothing.

But appellee's cashier had suggested by telegram the night before that Wilshire should bring currency. He had brought paper, and appellee if it took the paper at all must treat it as money. It was an unusually large amount, and appellee had another Fidelity bank draft for $217,000 then in Cincinnati for collection, from which it had not then heard, so appellee's cashier, before finally taking the paper asked Wilshire if the Fidelity bank was solvent. (Rec., 321.)

If the cashier had felt the least suspicion of the true state of the facts as subsequently disclosed, would he have put such a question to Wilshire? But it was a very pertinent question to put to a man who was believed to be having large monetary transactions with the Fidelity bank, and who had the minute before endorsed its two drafts for $200,000.

So far from being negligent in the taking of this paper, appellee was unusually cautious. Appellee had two executive officers, Mr. Dewey, the vice-president, and Mr Dewar (A. L. Dewar) the cashier. The former was at home sick, and the cashier had to act alone, and he had asked the bank's attorney to be at the bank in case any legal advice should be needed. Before the cashier took the paper he stepped outside the private office and told the bank's attorney what Wilshire had said and that "*everything appeared perfectly straight.*" (Rec., 321.).

Who can believe appellee's cashier would have taken this paper and paid out $239,000 on the faith of it if he had suspected it was other than the *bona fide* paper of the Fidelity bank, issued for a like amount of money received by that bank?

When appellee learned that the Fidelity bank had refused to pay the Irwin, Green & Co. draft for $217,000 and got its telegram asking that the draft be turned over to it without payment, it lost confidence in the solvency of the Fidelity bank, but it did not lose confidence in Wilshire. It still believed him to be the true principal, and telegraphed him to put his money in another bank. And Wilshire, keeping up the deception to the last, replied, "Will go to work at once and arrange matter, but you "must see Kershaw through without fail. You should

"have wired us sooner and would have fixed you up as "desired." (Rec., 60.)

Wilshire was vouched for, too, by Mr. Eggleston, who called him "Joe," and had known him since he was a boy.

Appellant's counsel may claim that appellee must have learned from rumors on the board of trade and in the public press that E. L. Harper was the real principal for whom Wilshire was acting. The following is the only only evidence on the subject and it does not sustain any such claim:

Mr. A. M. WRIGHT testifies that the general understanding from rumors on the board of trade was that the wheat was bought for Cincinnati parties, but he mentions no names, except the name of Wilshire, Eckert & Co. (Rec., 288, 294, 296.)

Mr. JAMES M. SHERMAN testifies that the rumors on the board of trade were that the wheat was bought for Cincinnati parties:

"The principals were variously stated—the real principals—but it was most of it done through Wilshire, Eckert & Co.

Q. Was Mr. J. W. Hoyt known as interested in that deal?

A. His name was mentioned also; also Mr. Harper's; also Rockafellar's; also another Standard Oil man in Cincinnati." (Rec., 301.)

Mr. HAMILTON DEWAR, a member of the firm of C. J. Kershaw & Co., testifies in reference to this matter as follows (Rec., 400, 401):

"Q. Was Mr. Harper a gentleman who was very well known on the Board of Trade as a speculator in wheat in Chicago?

A. I never heard of him until about March, 1887.

Q. Where did you hear about him then?

A. I heard of him; he commenced to be talked about; the papers commenced to talk Harper was doing this and Harper was doing that.

Q. The papers in Chicago?

A. Yes, sir.
Q. He was doing what?
A. He was buying all the wheat in Chicago—trying to buy all the wheat in Chicago; that was the first I heard of Harper.
Q. That was in March, 1887?
A. Yes, sir.
Q. Did that keep up in the newspapers down to the time of the 15th of June, more or less discussion of it?
A. No, not particularly; it kind of died out.
Q. How early in March was it?
A. I don't remember.
Q. Do you mean, when you say it kind of died out, that it did not continue to be discussed at intervals by the newspapers and on the board of trade?
A. They discussed a great many other people beside Harper there.
Q. I am speaking of Harper and his connection with the deal, the fact that he was trying to buy all the wheat in Chicago?
A. I don't think it was—no. Off and on, at intervals I think his name was brought up, the same as other people, Armour and all the rest of them."

There is no evidence that any officer of the American Exchange ever heard any rumor connecting Harper's name with these purchases. Kershaw asked Wilshire repeatedly for the name of his principal (Rec., 266), and was assured it was not Harper. (Rec., 264.) Mr. Kershaw also asked McHenry if he knew who Wilshire was buying for, and McHenry said he "understood they were "very good people." Kershaw then asked him "if he "thought it was Harper," and McHenry said "No, that "he had reason to believe it was not Harper." (Rec., 264.

Wilshire says, "I always endeavored to hide who the "principal was." (Rec., 127.)

How successfully Harper's connection with the matter was hidden, is shown by the testimony of Mr. Gahr, who says his relations with Mr. Harper were so intimate that he supposed he had his confidence in all his business transactions. He says: "Previous to the night of the

"14th of June I would have taken my oath that he was "not in the wheat deal. I asked him about it before that, "and he told me positively that he was not in the deal. "He said, 'I am not in the wheat deal, I would not be "unless you knew of it.' And at the same time he was "in the deal." (Rec., 138.)

Appellee is not chargeable with notice of board of trade rumors, or what appears in the public press. But suppose it had learned as a fact that E. L. Harper was buying wheat through Wilshire, that would not have been notice that the statement in this paper that Wilshire, Eckert & Co., had deposited $200,000 was false. Nor would it have been notice that Harper was using the funds of the bank. Harper was very careful to have all this $600,000 of paper signed by Mr. Hopkins, the assistant cashier. He did not leave a loophole open for suspicion to enter, for suspicion meant ruin and the penitentiary to him.

Appellant's counsel have seriously urged that appellee should have made inquiries of Wilshire and that in him they had means of information at hand. To this we reply: First, that nothing had occurred to make appellee suspicious of the *bona fide* character of the paper of the Fidelity Bank. Second, Wilshire himself, by delivering this paper, repeated the statement of the Fidelity Bank, and made it his own statement that he had deposited $200,000 to the credit of appellee. Wilshire knew this statement was false. He had come from Cincinnati for the express purpose of deceiving appellee by this false statement, and getting appellee to advance money on the faith of it.

It is absurd for appellant to claim that Wilshire was a means of information, and that appellee was guilty of negligence in not questioning him.

"It were vain to hope for a disclosure of the truth from one who is fraudulently disposing of that which he has no right to convey.

A purchaser will not be charged with notice by being put on inquiry, unless he has some more authentic means of information than can be found in an application to one who is interested in concealing the truth. It is useless to ask for an explanation or denial which would not be entitled to credence." (Leading Cases in Equity, Vol. II, Pt. 1, 166.)

Appellant's answer alleges that Harper, Hopkins and Wilshire had conspired together to embezzle the funds of the Fidelity Bank, and that this paper was signed by Hopkins and delivered by Harper to Wilshire to be used in these purchases of wheat.

The evidence tends to show the truth of these allegations, but there is no evidence tending to show that appellee had any suspicion of this state of affairs or that there were any facts or circumstances which should have made appellee suspicious.

The success of the conspirators depended on concealment and upon consistent representation that Wilshire was depositing in the Fidelity Bank the funds for which it was issuing its paper.

Hopkins and Harper had authority to issue this paper if Wilshire did make the deposit, therefore the consequences of this fraud must fall upon their bank and not upon appellee.

Appellant's counsel may contend that appellee was not warranted in giving an immediate credit of $200,000 to Kershaw & Co. on the faith of this paper.

To this we reply:

First. So far as anything in this paper itself is concerned, it was left to appellee's option either to give Kershaw & Co. the immediate use of the money, or await its transmission.

Second. The panic in wheat upon the 14th of June; the fact that appellee had stopped payment of the checks of Kershaw & Co.; the telegram which the Fidelity National Bank sent appellee upon the night of June 14th, announcing that Wilshire would come with six hundred thousand *dollars* and the coming of Wilshire upon the morning of the 15th with this paper, as the "six hundred "thousand *dollars*" which the telegram promised; all show that the Fidelity National Bank in issuing this paper intended that it should be used by appellee as *money*. It was evident that if it could not be used as money it might as well not be issued. If Kershaw & Co. could not have the benefit of it until the cash was transmitted, it would entirely fail to meet the emergency.

Third. The contract between the two banks which we are seeking to enforce was made in Illinois, and must be interpreted by the law of that state.

Scudder v. *The Union National Bank of Chicago*, 1 Otto, 406.

It has been decided by the Supreme court of Illinois that a promise to pay checks to be drawn in the future, may be enforced, if the promise is acted upon, although no particular checks are specified in the promise.

Nelson v. *First National Bank Chicago*, 48 Ill., 36.

This is, therefore, the law by which the contract we are now considering must be construed.

Appellant's counsel may further claim that if appellee can recover at all in this suit, it can recover only the money which it paid out in reliance on this paper.

To this we reply:

First. This paper is a contract offered by the Fidelity National Bank, to appellee, to become debtor as a bank to appellee in the sum of $200,000. The contract does not contain any requirement that appellee shall pay anything. Appellee is simply asked to assume the relation of creditor to the Fidelity bank for the benefit of C. J. Kershaw & Co.; the object of the offer was simply to convert a credit in Cincinnati, for which Wilshire had paid, into a credit in Chicago with appellee as the banker of C. J. Kershaw & Co. for the use of that firm.

Appellee accepted the offered contract, assumed the relation of creditor for the use of C. J. Kershaw & Co. to the Fidelity National Bank, and at once gave C. J. Kershaw & Co. credit for $200,000 which was a full compliance with the contract by appellee.

When appellee placed $400,000 to the credit of Kershaw & Co., it paid them that amount. It was the same in legal effect as if appellee had given Kershaw & Co. the $400,000 in currency and they had deposited it to their credit in some other bank.

Second. We will go further, however, and show what appellee did and suffered because of taking this paper.

We surmise that appellant's counsel will say that appellee only paid out $239,930.78 on the faith of all the paper of the Fidelity bank, and that this should be the extent of its recovery upon all the paper. But this is neither in accordance with the facts nor the law.

Appellee held Kershaw & Co.'s check for $256,878.18 which it was carrying. There is no question about the regularity of this check nor about appellee's right to have it paid at once. It had not been charged up, for there was only $11,401.17 in Kershaw & Co.'s account to charge it against.

This check was paid by appellee and charged to Kershaw & Co. on the morning of June 15th, in reliance upon the deposit of Fidelity bank paper for $400,000.

The deposit was made to be placed to the credit of Kershaw & Co. *generally*, with no limitation, except, if you please, an understanding that their checks to other parties should be paid to the extent of $218,000, which was done. A bank has a right to apply its customer's deposit to the payment of his indebtedness to the bank if due.

Mr. Morse says (Morse on Banks and Banking, 3d Ed., Sec. 324):

> "The rule may be broadly stated, that the bank has a general lien on all moneys and funds of a depositor in its possession for the balance of the general account. Of course, so long as the balance is in favor of the depositor, the lien has no vitality in it. But when payment upon an overdraft, a discount, an acceptance, or other species of advance or loan by the bank to him creates an indebtedness on his part, all the funds which the bank has or obtains to his credit may be applied upon such indebtedness until it is fully discharged.
>
> "The funds thus applicable have been said to be not alone the general deposit of the customer, but any business paper, as notes or bills, belonging to him and which he has intrusted to the bank for collection."

Appellee had as good a right to hold this check until there were funds enough in the drawer's account to pay, and then to present it for payment, as an outsider would have had.

Moreover, Kershaw & Co. themselves understood that from the deposit which was made all their outstanding checks should be paid. (Rec., 260.)

In addition to canceling this check, appellee paid out upon June 15th $239,930.78 upon checks presented at its counter. It, therefore, paid out during the day a total of

$496,808.96. It received on deposit $399,200 in Fidelity bank paper, $25,249.40 in a draft drawn against a shipment of wheat, and there was a credit upon the books at the beginning of business of $11,401.17. The deposit of Fidelity bank paper was, therefore, more than exhausted and the account was overdrawn $60,958,39 at the close of business.

A brief statement of the account is as follows:

Cr.	Dr.
$ 11,401.17	$256,878.18
252,249.40	239,930.78
399,200.00	
$435,850.57	$496,808.96

Appellee also forbore to sell the grain which it held as collateral security for Kershaw & Co.'s indebtedness. This grain was worth on June 14th, at the lowest market price of the day, $544,894. After payment of this Fidelity bank paper was refused, appellee sold this grain and only realized $449,194, a shrinkage of $95,700.

There was no agreement that appellee should hold this grain, but the deposit of $400,000 made it unnecessary to sell, and good faith towards Kershaw & Co. required, under the circumstances, that this security should not be sold upon a panicky market.

Appellee, therefore, in reliance upon this Fidelity bank paper, paid the check of Kershaw & Co. for $256,878.18 on which the drawers were directly and immediately liable, gave them $239,930.78 of fresh money, and suffered a loss of $95,700 on the collateral security which it held.

It is possible appellant's counsel may undertake to make some computation showing appellee's total loss in these

transactions with Kershaw & Co., and may undertake to credit what appellee realized from the grain which it held as collateral security. If so, we wish to say that there are no sufficient data before the court for making any such computation. Appellee held the grain as collateral security for certain notes of Kershaw & Co., amounting to $280,000, and these notes gave appellee the privilege of applying the collateral security to the payment of any other liability of Kershaw & Co. (Rec., 30.) This grain has been sold and the proceeds credited generally to the account of Kershaw & Co., but it is impossible to tell how much appellee will be obliged to charge against this account, because there was then, and is now, considerable litigation pending and undetermined in which parties are seeking to recover from appellee large sums of money on account of Kershaw & Co.

In our view, however, the matter of the application of the proceeds of the collateral security has nothing whatever to do with these cases.

Fourth. Kershaw & Co. deposited and appellee credited the three pieces of Fidelity bank paper as one cash item. Whatever, therefore, appellee did on the faith of the deposit of $400,000 was done on the faith of each and every piece of paper which went to make up that deposit.

But appellant's counsel claim that this paper for $200,000 was a mere representation. If the paper for $200,000 was a mere representation, then, although appellee might cancel a past indebtedness and pay new checks on the faith of the representation, the paper itself could not properly be made the subject of deposit in a bank. As to the two bills of exchange, however, it cannot be denied that they are negotiable commercial paper, and as such they were proper items for deposit in a bank.

Appellee had an undoubted right to apply them upon overdue indebtedness, and if, as claimed, the paper for $200,000 could not be so applied, what is the result? The two bills of exchange for $100,000 each are applied upon the overdraft, and a credit for $200,000, based upon the Fidelity Bank paper for that amount, is applied upon the fresh money which appellee paid out, amounting to $239,930.78. Appellant cannot defeat the application by appellee of the two bills of exchange upon past indebtedness by claiming that appellee could not apply the credit for $200,000 in that way. He cannot be allowed to diminish the amount of appellee's recovery on this particular piece of paper which we are now discussing by charging against the fresh money which appellee paid out any part of the two drafts, the full amount of which appellee applied, and had a right to apply, upon the past indebtedness.

If appellee gave Kershaw & Co. credit for $399,200, and only $200,000 of this could properly be treated as deposit, the law will apply this, in default of application by the parties, in payment of the oldest debits in the account, and this leaves the new checks to be charged against the paper for $200,000 which we are now discussing.

We speak of appellee's right to credit this deposit upon the overdraft of Kershaw & Co. The court will, however, remember that the act of the parties in making the deposit amounted to such an application. The deposit was made generally, and therefore was a general credit of each and every item of paper, and if this paper we are now discussing was not a proper item for deposit, then the parties themselves must be considered as having applied at the time they made the deposit, the two drafts

for $100,000 each upon the overdraft. Mr. Kershaw himself testified, that of course it was the intention to pay all their outstanding checks. As he says: "We could not "have a check out and go on." (Rec., 260.)

Fifth. When appellee accepted this paper it was at liberty to use the credit for $200,000 in any manner that Kershaw & Co. and appellee might themselves agree upon. The only requirement made by the Fidelity Bank in issuing the paper was, that the credit should be applied *to the use of C. J. Kershaw & Co.* If the Fidelity Bank when issuing the paper, intended that appellee should give C. J. Kershaw & Co. $200,000 to be used outside of the American Exchange, it should have been so specified in the paper itself.

But this was not the intention. The protection of C. J. Kershaw & Co. was the object in view, and this required the payment of their indebtedness to appellee as much as the payment of their indebtedness to any other party.

Sixth. If appellant's counsel claim that appellee cannot recover the full amount of this paper, he has not the law upon his side.

As appellee is seeking to recover on a contract and has fully complied with its part of it, appellant must fully comply with the Fidelity Bank's part of it. If Wilshire did not put $200,000 to the credit of appellee, as the Fidelity Bank declared he had done, appellant must put the money to appellee's credit. He must make good the representation. He cannot inquire whether this contract was a source of loss or profit to appellee.

Mr. Herman states the law as follows:

"As a general rule, the estoppel created by a false representation acted upon is commensurate with the thing represented, and operates to put the party entitled to the benefit of the estoppel in the same position as if the thing represented was true." (Herman on Estoppel, Sec. 778.)

Mr. Bigelow states the law in substantially the same way. (Bigelow on Estoppel., 4th Ed., p. 632.)

See also:

Grissler v. *Powers*, 81 N. Y., 57.

III.

Appellant makes a further defense to this suit (Appeal, No. 1,111) that Harper, Hopkins and Wilshire "with "other persons to this defendant unknown," were at and before June 14, 1887, engaged in purchasing large quantities of wheat upon contracts for future delivery, and otherwise, with the object of creating "what is called a "corner in the market," and that at the time of the delivery of this paper in suit to appellee, it had "*knowledge* "*and notice* that Harper, Hopkins and Wilshire" were engaged in such deal or speculation in wheat "in the manner aforesaid," and that this paper for $200,000 "was delivered to the said Joseph "Wilshire and by him to the said plaintiff to be used by "and through the said complainant, and by the said C. "J. Kershaw & Co., who were, and were well known "to the complainant to be brokers engaged in the pur- "chase of wheat, in said deal or speculation for the ac- "count of said Wilshire and his confederates."

This defense must be considered entirely separate and apart from the defense that the Fidelity National Bank did not in fact receive the $200,000 upon deposit, and

that the paper was fraudulently issued by Harper and Hopkins, the executive officers of that bank. The two defenses cannot be blended together and made to strengthen each other.

In examining and weighing this defense it must, therefore, be constantly borne in mind that Wilshire, Eckert & Co. did actually deposit $200,000 in the Fidelity National Bank (or that appellant cannot deny it, which is the same thing) and that appellee had no interest in this matter whatever. The two banks were simply transferring money from Cincinnati to Chicago for the accommodation of their respective customers. A credit which Wilshire purchased with the Fidelity bank in Cincinnati was converted into a credit with appellee in Chicago for the use of C. J. Kershaw & Co. It will be remembered that the two banks were regular correspondents, the balance being sometimes in favor of the one and sometimes in favor of the other, and this balance was treated by the bank in whose favor it stood as cash on deposit with the other bank.

If Wilshire deposited $200,000 with the Fidelity bank in Cincinnati to the credit of appellee, and upon notice thereof, by telegram, appellee gave Kershaw & Co. credit for a like amount, the legal effect of that action was a transfer of money to Chicago, and that was exactly what the parties intended.

The position of the defense is, therefore, simply this: If a bank receives money from A to be transferred to B, it may refuse to pay over the money to B, on its own motion, because it knows that B intends to use the money to pay a gambling debt which A has contracted.

The mere statement of this position demonstrates its

weakness. The fact that we have in this case two banks instead of one, does not alter the principle.

A bank having received a deposit must honor the customer's checks against it. It may refuse the deposit when it is tendered if it sees fit, but once having received it, its duty is to pay the customer's checks until the deposit is exhausted. It cannot refuse to pay on the ground that the customer intends to make an improper use of the money.

If Wilshire and Kershaw had been engaged in gambling and Wilshire had deposited money in the Fidelity bank to be transmitted to the American Exchange, that Kershaw & Co. might check out the amount from the latter bank in payment of losses sustained in the gambling transactions, and both banks knew that the money was to be so used, the Fidelity bank having received the deposit could not refuse to pay over the same to the American Exchange, and the American Exchange having received the deposit could not refuse to honor the checks of Kershaw & Co.

The authorities in support of this proposition are numerous.

Tenant v. *Elliott*, 1 B. & P., 3, arose upon the following facts: A broker procured insurance upon goods which were being shipped on a foreign vessel bound to the East Indies in violation of a statute which expressly forbade the furnishing of goods for such ships. The ship was lost, and the underwriters paid over the insurance money to the broker. *Held*, that the broker must account for and pay over the money to the plaintiff.

Farmer v. *Russell*, 1 B. & P., 296, arose upon the following facts: A agreed to carry certain "medals" to

Portsmouth and deliver them to B. A entrusted the "medals" to C, a common carrier, with orders to deliver to B, upon payment. The "medals" were, in fact counterfeit half-pence. C delivered them to B and collected the money. *Held*, that he must account to A for whatever he had collected. The court discusses and approves *Tenant* v. *Elliott*.

Sharp v. *Taylor*, 2 Phil., 801. In this case the facts were, briefly, as follows: A and B were partners engaged in trading with a vessel in violation of the American and English shipping law. A received all the profits and refused to account. *Held*, that he must account and pay to his copartner.

In *Armstrong* v. *Toler*, 11 Wheat., 258, Chief Justice MARSHALL cites with approval the case of *Farmer* v. *Russell*, and gives the following abstract of the decision:

"Chief Justice Eyre said that the plaintiff's (B) demand arose simply from this circumstance that money was put into the hands of C (by A) for his use; and Justice Buller said that the action did not arise upon the ground of the illegal contract," and the chief justice adds, by way of comment, "yet in this case A's original title to the money was founded on an unlawful contract, and he could not have maintained an action against B."

In *McBlair* v. *Gibbes*, 17 How., 232, the court says:

"If the party who might set up the illegality chooses to waive it, and pay the money, he cannot afterwards reclaim it. And if, even, the money be paid to a third person for the other party, such third person cannot set up the illegality of the contract on which the payment has been made and withhold it for himself."

The court cites with approval: *Tenant* v. *Elliott*, *Farmer* v. *Russell*, and *Sharp* v. *Taylor*.

In *Kinsman* v. *Parkhurst*, 18 How., 289, the court (*Mr. Justice* CURTIS) says:

"Even where money has been received, either by an agent or

a joint owner, by force of a contract which was illegal, the agent or joint owner cannot protect himself from accounting for what was so received, by setting up the illegality of the transaction in which it was paid to him."

The court cites, to sustain this law, *Sharp* v. *Taylor*, *Tenant* v. *Elliott*, and *McBlair* v. *Gibbes*.

Brooks v. *Martin*, 2 Wall., 70, grew out of certain partnership transactions which the court determines were illegal. The defendant being called upon to account as one of the partners, set up this illegality as a defense, and claimed that the plaintiff was not entitled to any relief in a court of equity, even if it should appear that the defendant had realized a large sum out of the venture and defrauded plaintiff out of his share. *Held*, that it did not lie in the mouth of the defendant to refuse to do equity, because of the wrong originally done. The court cites in support of its opinion, *Sharp* v. *Taylor* and *McBlair* v. *Gibbes*.

In *Planter's Bank* v. *Union Bank*, 16 Wall., 483, the court cites in support of its opinion *Farmer* v. *Russell* and other cases as shown by the opinion.

Union Pacific R. R. Co. v. *Durant*, 95 U. S., 576, arose upon the following facts: Durant had received conveyances of certain lands which the railroad company claimed to own, and a bill was filed to compel Durant to convey. Durant, in his answer, set up, amongst other things, that the lands were conveyed to him under an agreement between the railroad company and the grantors which was illegal. The Circuit court for the district of Nebraska sustained this defense and dismissed the bill, but the Supreme court reversed the case, with directions to enter a decree in favor of the complainant. The court says:

"But it is said the conveyances grew out of an illegal transaction between the company and the grantors. To this there are several answers. The grantors have voluntarily executed the contract. They have not intervened, and do not complain.

The conveyances to the trustee were, in the view of the law, the same thing as if they had been to the company. The transaction between the parties in interest was thus finally closed. There will be neither more nor less of illegality between the original parties, whether the trustee does or does not respond to his obligation to the company. In that obligation there is no pretense for saying there is any taint of any kind, and it is that obligation alone which it is sought to enforce by this proceeding."

The court cites, amongst other cases, in support of the opinion, *Sharp* v. *Taylor*, *McBlair* v. *Gibbes*, and *Brooks* v. *Martin*.

Caldwell v. *Harding*, 1 Lowell, 326, lays down the same doctrine. And so, also, does *C. T. Co.* v. *O. C. R. R. Co.*, 23 Fed. Rep., 306. In the latter case a pooling contract had been entered into between two railroad companies; had been fully executed, and the profits therefrom collected by the receiver of one of the companies. *Held* by the court (Mr. Justice MATTHEWS) that the receiver could not retain the whole of the profits, but must pay over to the other company their share under the contract, even if the pooling contract was void, as in restraint of trade, contrary to public policy, or *ultra vires*.

Wann v. *Kelly*, 5 Fed. Rep., 584, grew out of the following facts: Three persons agreed to speculate in differences in stocks. One of the parties acted as manager and received a profit, for which he refused to account. *Held*, that he must account to the other two parties, and could not protect himself by setting up the illegality of the transaction.

W. U. Tel. Co. v. *U. P. Ry. Co.*, 1 McCrary, 558, is to the same effect. The opinion was rendered by Judge McCrary.

Burke v. *Flood*, 6 Sawyer, 220. The officers of two corporations made contracts between the two corporations which amounted to a conspiracy to defraud one of them. The profits from the transaction came into the hands of a copartnership. *Held*, that they must be divided among the copartners according to their respective interests in the firm.

The decisions in the state courts to the same effect are very numerous and pertinent, but we forbear citing them.

McMicken v. *Perin*, 18 How., 507. This case arose upon the following facts: A borrowed money from B with which to buy certain real estate, and had the title transferred directly to B as security for the loan. *Held*, that B could not refuse to turn over the property because of illegality in the contract between A and the vendor. The court says:

"The case made is that the appellee borrowed of the appellant a sum of money to complete his purchase, and that the title was placed in the name of the appellant to secure the repayment of that advance. The latter cannot be heard to object that there was illegality in the contract between Fletcher's heirs and appellee, nor to appropriate to himself the fruit of that contract. The contract between the appellee and appellant is uninfected by any illegality. The consideration was a loan of money upon a security. The contract between Fletcher's heirs and the appellee is completed and closed, and will not be disturbed by anything which the court may decree in this case."

Nicholson v. *Gooch*, 5 E. & B., 999 (85 *E. C. L. R.*) This case arose under the English statute to prevent the "infamous practice of stock-jobbing," which made it illegal *to pay* any loss sustained in a stock-jobbing operation, and the case was, therefore, decided for the defendant. But CROMPTON, J., says of *Tenant* v. *Elliott*, *Farmer* v. *Russell*, and other cases of that description, that in

those cases the receipt of the money was a legal act, "for," he says:

"There is nothing illegal in paying money which cannot be recovered owing to the law having declared the contract illegal, and having prevented its being enforceable at law. It may often be honorable and proper to pay a bet, even though lost at an illegal game; and, if I pay a sum of money to the agent of the winner of such bet, who receives it for him, there is no illegality in such receipt to prevent an action for money had and received lying. So also in the case of an immoral consideration, though no action can lie on a promise founded on such consideration, yet it may often be right and proper, and even a duty, to pay money promised to the party, although such party may have been concerned in the immorality; and in such case the receipt by an agent, not being illegal, may well be the foundation of an action."

Broom's Legal Maxims, 694. The author says the maxim *par delictum*, does not seem to apply where one of the parties to an illegal transaction brings an action against a third party to recover money received in respect of the illegal contract, as "where, for instance, "A received money for the use of B on an illegal con- "tract between B and C, it was held that A could not "set up the illegality of the contract as a defense in an "action brought by B for money had and received."

Appellant's counsel will, doubtless, cite the statute of Illinois which makes an attempt to corner the market in grain a criminal offense. But this statute has no application whatever to this case.

These two banks were not attempting to corner the market in wheat. Whether Wilshire and his confederates were engaged in such an attempt and had made purchases to that end through Kershaw & Co., as their brokers, is altogether another question. But this is not a suit by Kershaw against Wilshire, nor a suit by Kershaw & Co. against the Fidelity bank. It is a suit upon a contract made by the Fidelity National Bank with ap-

pellee, and appellant cannot refuse to comply with this contract and defend his refusal simply by saying you knew that if you paid over that money to Kershaw & Co., as the Fidelity bank requested you to do, it would be used in an illegal transaction.

The case of *Pearce* v. *Foote*, 113 Ill., 228, cited by appellant's counsel upon the hearing of this case in the Circuit court, is not in any respect analogous.

Foote made an express agreement with certain commission men to trade exclusively in differences in options, declaring that he did not want to buy any grain, or pork, or lard, but simply wanted to speculate and settle on differences. He lost a large sum in transactions of this nature, and endorsed over to the commission men certain notes which he held. The court held, that such options to buy or sell were gambling contracts, and as the statutes of Illinois provide that any person who shall lose in a gambling transaction, may recover back from the *winner* whatever he shall pay on account of such loss, the court held that Foote might recover the value of the notes from the commission men to whom he had assigned them.

The complainant in this case is not in the situation of Foote's brokers; it is not a winner in any gambling transaction. If any money has been lost in an attempt to corner wheat, it has not been lost to the American Exchange Bank.

It is true that the court, in deciding this case, said:

"There is and could be no such thing as agency in "the perpetration of the crimes or misdemeanors pro- "hibited by this act. All persons actively participating "are principals." This was said, however, in reply to

the suggestion that the brokers, who, in that case, had made an express agreement to deal in options and settle on differences, were not participants in the illegal transaction. The language of the court means this: That, as the brokers were participants in the illegal transaction, they could not shield themselves from its consequences by claiming that their interest was only that of a commission. But appellee in this case is not in the situation of Foote's brokers, and appellant is not in the situation of Foote.

The learned counsel for appellant confuses the two defenses of this case, and in discussing the bearings of the alleged illegality of the transactions in wheat assumes that appellant stands in the shoes of Hopkins, Harper and Wilshire. But, as we have said, appellant, so far as this defense is concerned, stands as an honest banker who has actually received $200,000 in money; has agreed to pay the same to appellee, and now refuses to pay, and this *on his own motion*, not because Wilshire has prohibited payment, and not because of any difficulty between Wilshire and Kershaw & Co., or between Wilshire and appellee. The true presentation of this case is, that this honest banker has received this money, and all other parties to the transaction desire that it shall be paid over in accordance with his agreement, but he refuses to pay, solely because the money which appellee has advanced in reliance upon his agreement was used in paying debts incurred in an illegal transaction.

The statute of Illinois, which appellant's counsel endeavor to apply to this case, has been before this court and the Supreme court of Illinois in several cases, all growing out of transactions which the statute calls options. None of these cases, however, have

any bearing upon this case at bar, not so much because the cases which have been decided and reported grew out of deals in options, as because they arose between brokers and principals, or between winner and loser, and for this reason we do not refer to any of these cases, although we have carefully examined them all.

Appellant's counsel, however, claim that the money advanced by appellee to Kershaw & Co. upon June 15th was knowingly loaned or advanced at the time in the course of alleged unlawful dealing, constituting an attempt to corner the market and to aid them in such attempt, and that this was criminal under the statute of Illinois.

To this we reply:

First. The statute of Illinois makes all agreements for the reimbursing of any money loaned or advanced at the time and place when and where playing or betting is going on, to any person so playing or betting, void. Appellant's counsel take it for granted that this provision of the statute applies to the loaning of money to one engaged in attempting to corner the market. We do not agree with appellant's counsel in this construction of the statute, but will not stop to argue the matter, for we fail to see how the statute could be applied to these cases at bar, if appellant's construction of it were correct.

This is not a suit against Kershaw & Co. to recover money loaned to them, and it is entirely unnecessary to determine here whether or not appellee would have any right of action against them.

Second. It is not a fact that appellee advanced money to Kershaw & Co. to assist them in attempting to corner the market.

(*a.*) It is not averred in appellant's answer, nor

proved in the case, that Kershaw & Co. were engaged in any such attempt. The averment of the answer is that "E. L. Harper, Benjamin E. Hopkins and Joseph "Wilshire, *with other persons to this defendant unknown*," were engaged in this unlawful attempt. It is averred that Kershaw & Co. were acting as brokers, but it is not averred that they had any knowledge of the object of their principals, and the evidence shows that they had no such knowledge. The evidence also shows that they were not the only brokers making the purchases alleged to have been made in an attempt to corner the market.

(*b.*) The money which appellee advanced to Kershaw & Co. upon the 15th of June, which is the only money here in question, was not loaned to C. J. Kershaw & Co. upon an agreement from them to repay the same. It was given to C. J. Kershaw & Co. in consideration of the deposit of $400,000 of Fidelity Bank paper under the circumstances hereinbefore fully set forth.

(*c.*) There is no proof that any money paid from the account of Kershaw & Co. upon June 15th was paid out for wheat purchased for Wilshire. It may have been so applied and it may not. If it was so applied, it is not *proved.* It may be *guessed* from some portions of the evidence that some portion of the money was used in payment for, or for margins upon wheat. But the burden was upon appellant to show clearly, if he deemed it material, that the money which was paid out was upon illegal transactions. The court will presume that the money was paid on legal transactions, unless the evidence forces a conclusion to the contrary.

It is very strange if Kershaw & Co. did not pay out this money upon their most pressing debts, and strange if they did not favor, so far as possible, their personal

friends. The evidence shows that their checks had been stopped for $60,000 the day before, and that there was a great run on the morning of June 15th upon them and upon their bank account.

It is stranger still that appellant's counsel, who took the evidence in this case, counsel remarkable for his legal acumen and astuteness, did not trace the payments of this money (which could easily have been done) and show, if such were the fact, that it was paid upon purchases made in an attempt to corner the market. The reasonable inference to draw from his failure to show how the money had been applied, is that the proof would not have sustained the allegations of his answer.

We have sufficiently answered, as it seems to us, appellant's claim that appellee knowingly loaned this money to Kershaw & Co. to assist them in attempting to corner the market.

We may, however, properly add in this connection that if it should be inferred from the evidence that any part of the money paid out upon the 15th of June was paid upon purchases of wheat, it must also be inferred that such payments were not made for present purchases; that is, they were not made "at the time and place" of the purchases, but the money advanced was advanced to pay debts incurred in making purchases *at some time in the past.*

There is no proof that any part of the money which appellee paid for this paper was used in new purchases of wheat. Kershaw & Co. had purchased wheat for Wilshire "at and before the 14th of June," as the answer alleges and proof shows, and in making such purchases had incurred indebtedness. There is nothing in

that the borrower is about to make an improper use of the money.

Tyler v. *Carlisle*, 79 Me., 210.

In this case the court says: "It does not follow that "the lender has a guilty purpose merely because he "knows or believes that the borrower has. There may "be a visible line between the motives of the two. If it "were not so, men would have great responsibilities for "the motives and acts of others. A person may loan "money to his friend—*to the man, and not to his purpose.* "He may not be willing to deny his friend, however "much disapproving his acts."

Armstrong v. *Toler*, 11 Wheaton, 258.

Planter's Bank v. *Union Bank*, 16 Wall, 483.

McGavock v. *Puryear*, 6 Coldwell (Tenn.), 34.

Waugh v. *Beck.*, 114 Pa. St., 492.

We need not cite any further authority. Appellant's counsel recognizes that this is the law, and charges as matter of fact that appellee was an active participator in the alleged attempt to corner the market. He says that in advancing this money to Kershaw & Co., appellee became a participant in the illegal business, and further says that appellee had previously advanced a large sum of money to Kershaw & Co. upon a part of the wheat as collateral security, and in that way had aided in the prosecution of the alleged attempt to corner the market.

The evidence entirely fails to support these charges. It is needless to recapitulate here, what we have already so fully said in reference to the advances which appellee made upon the 15th of June. As to the charge that ap-

pellee advanced a large sum of money upon a part of the wheat as collateral security, we need only say this: It appears from the evidence that Kershaw & Co. relied chiefly on Eggleston to borrow money for them to use in paying for wheat, and that he had borrowed in his own name and upon his own credit from fifteen different banks, and that he was acting as a banker for Kershaw & Co., and was carrying for them the larger part, yes, nearly all, of the wheat which they had purchased.

Appellee had only 692,000 bushels of wheat belonging to Kershaw & Co. at the time when this money was advanced upon the 15th of June. It had advanced money from time to time to Kershaw & Co. upon wheat as collateral security, but there is no proof that appellee knew or had any reason to suspect that the wheat which they took was purchased in an attempt to run a corner. It is not charged in the answer that Kershaw & Co. were themselves engaged in any such attempt, and the proof clearly shows that they did not learn until the 30th of May, that Hoyt and Wilshire had any relations with each other, and Kershaw & Co. had no reason to suspect prior to that time that Hoyt and Wilshire were purchasing for the same parties.

Further, the testimony shows that the wheat which appellee held from time to time was largely used by Kershaw & Co. for purposes of shipment. And, finally, it appears clearly that the quantity of wheat at any time held by appellee was very small as compared with the quantity it would have been necessary to purchase in an attempt to corner the market, and that, therefore, there was nothing in the circumstance that Kershaw & Co. were borrowing from appellee upon wheat as collateral security calculated to make appellee suspicious

that such wheat was being purchased in an attempt to corner the market.

The court will not lose sight of the very important fact in this case that the paper for $200,000 upon which this suit is based, was issued *directly to appellee*, and that it either itself is, or is evidence of, a contract between the two banks which is supported by the consideration of a deposit of $200,000 made by Wilshire in the Fidelity bank. This contract has not the slightest taint of illegality. If appellee itself had been directly and actively engaged with Wilshire in an illegal transaction, that would be no defense for appellant. Appellee would not require even in such a case any aid from the illegal transaction in seeking to enforce this contract.

This court has repeatedly affirmed that an obligation will be enforced, although indirectly connected with an illegal transaction, if supported by an independent consideration so that the plaintiff does not require the aid of the illegal transaction to make out his case.

Armstrong v. *Toler*, 11 Wheat., 258, arose upon the following facts: During the war of 1812, between this country and Great Britain, goods were shipped from Canada into this country for Armstrong, and other citizens of the United States, and consigned to Toler, also a citizen of the United States. The goods were seized and libeled in the District court of Maine as having been imported contrary to law. They were, however, delivered to an agent of the claimants, upon a stipulation to abide the event of the suit, Toler becoming liable for the appraised value; and Armstrong's part of the goods were delivered to him on his promise to pay Toler his proportion of any sum for which Toler might be liable if the goods were condemned. The goods were subsequently

condemned, and Toler paid their appraised value, and brought this action to recover back from Armstrong his proportion of the amount. The defense was that the contract was void as having been made on an illegal consideration.

The following instruction given to the jury was approved by the court:

"If the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act, and Chief Justice Marshall says, "The point of law decided is, that a subsequent independent contract, founded on a new consideration is not contaminated by the illegal importation, although such illegal importation was known to Toler, when the contract was made, provided he was not interested in the goods, and had no previous concern in their importation."

The opinion of the court approves the doctrine laid down in *Faikney* v. *Reynous* (4 Burr., 2069), and *Petrie* v. *Hannay* (3 Term Rep., 418). In reference to the former case the chief justice says:

"This is a strong case to show that a subsequent contract, not stipulating a prohibited act, although for money advanced in satisfaction of an unlawful transaction, may be sustained in a court of justice;" and in reference to the latter case he says, "This, also, is a strong case to show that a new contract, by which money is advanced at the request of another, or which is the same thing, where there is an express promise to pay may sustain an action, although the money was advanced to satisfy an illegal claim."

The court also approves the law laid down by Chief Justice EYRE in *Farmer* v. *Russell* (1 Bos. & Pull., 295).

Faikney v. *Reynous* arose upon the following facts: Faikney and one Richardson were jointly interested in certain contracts prohibited by law. A loss was sustained which was paid by Faikney, he taking a bond to secure Richardson's part of the loss. The suit was

brought upon that bond. *Held*, that the plaintiff could recover. Lord MANSFIELD says:

"One of these two persons has paid money for the other, and on his account, and he gives him his bond to secure the repayment of it. This is not prohibited. He is not concerned in the use which the other makes of the money."

Petrie v. *Hannay* arose upon the following facts: Plaintiff brought suit as executor. His testator and the defendant had been jointly interested in certain stock transactions prohibited by law. Considerable losses were sustained, which were paid by testator to the broker, except eighty-four pounds, for which testator drew a bill upon defendant. The defendant accepted the bill, but did not pay it, and it was collected from the testator. This action was brought to recover the amount which the testator had paid for account of defendant. *Held*, that he could recover.

The cases of *Faikney* v. *Reynous*, and *Petrie* v. *Hannay*, were again approved by this court, in *Planter's Bank* v. *Union Bank*, 16 Wall., 483. This case arose upon the following facts: The plaintiff had remitted to the defendant large sums of Confederate treasury notes, and had also forwarded to defendant drafts and other claims for collection, and it was understood between them that such drafts and claims were payable only in Confederate currency. All the collections made on account of the plaintiff were made in that currency, with its knowledge and authority. The action was brought to recover a balance of account, the amount of which was wholly made up in that way. In deciding this case the court (Mr. Justice STRONG) says:

"Nor should the court have charged that, in the circumstances of this case, no action would lie for the proceeds of the sales of Confederate bonds which had been sent by the plaintiffs to the

defendants for sale, and which had been sold by them, though the proceeds had been carried to the credit of the plaintiffs and made a part of the accounts. It may be that no action would lie against a purchaser of the bonds or against the defendants on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, expressed or implied, and the court will not unravel the transaction to discover its origin."

After citing *Faikney* v. *Reynous*, and *Petrie* v. *Hannay*, in support of his opinion, the court says:

"We are aware that *Faikney* v. *Reynous* and *Petrie* v. *Hannay* have been doubted, if not overruled, in England, but the doctrine they assert has been approved by this court. *Armstrong* v. *Toler*. 11 Wheat., 258; *McBlair* v. *Gibbes*, 17 How., 236; *Brooks* v. *Martin*, 2 Wall., 70.

"In *Bly* v. *Second National Bank*, 79 Pa. St., 453, the court says: It was long ago decided in England, and has often been repeated by our own courts, that the test whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his case."

Before closing the discussion of the law applicable to the defense to this suit, we wish to make just one other point.

This contract between the two banks was made in the State of Illinois. It was to be performed in the State of Ohio.

We are considering the defense to this case upon the hypothesis that Wilshire, Eckert & Co. actually de-

possited $200,000 in the Fidelity Bank to the credit of appellee.

This being the state of facts, appellant cannot be heard to say that appellee acquired this paper in connection with an illegal transaction. Such is the law of Ohio.

Ehrman v. *Insurance Co.*, 35 Ohio State, 324.

The court says in this case (page 337):

"A stranger to the agreement, or transaction, (as, in this case, the Fidelity Bank) has no right to question its validity, whether it was entered into between corporations or natural persons. To obtain a standing in a court of justice, to make such legal inquiry, the party must show that he is interested in the question, and that the execution of the agreement operates to his injury or prejudice."

The Fidelity Bank, having (as we are now supposing) received $200,000 from Wilshire on deposit, to the credit of appellee, must pay the same either to appellee or to Wilshire, and it is a matter of indifference to it to which one of the two it is obliged to pay. The case, therefore, falls exactly within the doctrine of *Ehrman* v. *Insurance Co.* The case at bar is, however, stronger in its facts, because the paper in suit was issued directly to appellee in the first instance.

IV.

For the purposes of the argument upon the law, we have assumed thus far that it was true, as alleged in appellant's answer, that appellee had "knowledge and notice" that this paper in suit was delivered to appellee to be used through appellee by C. J. Kershaw & Co., in connection with an attempt to corner the market, and we have endeavored to show that if this was true, such

"knowledge and notice" would not prevent a recovery by appellee.

We, however, do not admit, but deny that appellee had any such knowledge or notice, and propose now briefly to discuss this question of fact.

The main difference between appellant's counsel and ourselves in presenting these questions of fact is, that they present them from the inside of the Fidelity National Bank of Cincinnati, where it was known that Harper and Hopkins were speculating in wheat through Joseph Wilshire, while we present them as they were seen by appellee, who did not know that Harper and Hopkins had anything to do with the matter, and did not know that the purchases for Hoyt had any connection with the purchases for Wilshire.

It is said by appellant's counsel that it was well known to the officers of appellee that Kershaw & Co. and Wilshire were acting in behalf of a Cincinnati principal or principals. This is not correct. The record shows that Mr. Dewey, appellee's vice-president, went to Cincinnati upon the 27th of March to ascertain, if possible, from Mr. Hoyt, who the principal was for whom he was purchasing through Kershaw & Co. The testimony is as follows:

"Did you obtain any information from any source while you were there about the parties who were the principals in making these purchases through Hoyt? A. A number of parties were mentioned to me during my enquiries, as parties behind the deal, as they called it, but I was unable to get any information that would enable me to determine who they were, or form anything more than a guess.

"Q. Who were the parties that were mentioned? A. The Standard Oil parties, Cleveland parties; I remember Rockafeller's name especially being mentioned, and Mackey's name especially being mentioned.

"Q. Did anybody mention these names to you purporting

to have any knowledge of the facts, or were they merely mentioned to you as rumors and suspicions? A. The impression left on my mind was that they were mere guesses as to who they were; that they had no information in any way reliable." (Rec., 377.)

He testifies that his enquiries of Mr. Hoyt resulted only in this: "Mr. Hoyt declined to give me any information, "but did state that the parties had plenty of money, were "financially strong and fully able to protect their trades "with Kershaw; that is the conversation in substance." (Rec., 375.)

At this time appellee did not know Wilshire, and did not know anything about his purchases. There is no evidence that appellee learned that Wilshire was buying wheat through Kershaw & Co. prior to the 28th of April, upon which day the Fidelity Bank telegraphed appellee that Wilshire, Eckert & Co. had deposited with it $25,000 to be credited to appellee for the use of C. J. Kershaw & Co. (Rec., 48.)

Wilshire was making purchases through Rosenfeld & Co., commission men on the Chicago Board of Trade, but this fact was not known to appellee.

Hoyt designated his unknown principal as B, and the account of his transactions was kept upon the books of the Chicago houses, Irwin, Green & Co., and C. J. Kershaw & Co. under that letter. Wilshire's transactions were made in the name of Wilshire, Eckert & Co. and C. J. Kershaw & Co. kept their account with that firm.

Irwin, Green & Co. did not know that Hoyt was buying through Kershaw & Co. as well as through their own house, and did not know anything about the purchases being made by Wilshire.

C. J. Kershaw & Co., although they were buying for

both Hoyt and Wilshire, were not aware that Hoyt and Wilshire had any connection with, or knew each other, and Kershaw & Co. did not know that Hoyt was also buying through Irwin, Green & Co.

Mr. Kershaw testifies that his firm did not know that Hoyt and Wilshire had any connection with each other until the 30th of May, and did not then learn that Hoyt and Wilshire were acting for the same principal. (Rec., 266.)

The above shows the lack of co-operation among the Chicago commission houses and their lack of knowledge of each other's acts.

If they, who were making the alleged purchase did not know what was going on, how could appellee know?

E. L. Harper did not intend to let the Chicago brokers know anything about his designs. He communicated directly with Wilshire, but never with Hoyt. It was Hopkins who gave Hoyt orders and money. Hoyt did not even know Harper.

The Chicago houses acted upon direct orders. Sometimes they had orders to buy, sometimes orders to sell, sometimes orders to ship. Kershaw says: "We were "shipping wheat, shipping hundreds of thousands of "bushels." (Rec., 265.) Green says:

"In these purchases he (Hoyt) did not come and tell us to buy 9,000,000 bushels at once. They were bought gradually, and when we bought it he told us to go and engage the money to pay for it." (Rec., 282.)

Neither Hoyt or Wilshire ever made any arrangement with their Chicago brokers to accumulate any quantity of wheat, or to buy wheat until it had advanced to a certain price. Kershaw says:

"They didn't talk any; never gave me any idea of the prices that they wanted to sell at." (Rec., 272.)

And Mr. Green says that no amount was specified which his firm was to purchase, but that they obeyed any orders which were given from time to time, not knowing how high the amount of the purchases might run; (Rec., 283.)

Irwin, Green & Co., C. J. Kershaw & Co. and Rosenfeld & Co. were not knowingly working together to corner the market. There was no combination between them. They were ignorant of each other's acts. Kershaw testifies on this point as follows;

"Q. Then there was no combination at all between your firm and Rosenfeld's firm?
"A. Not a particle. I never had any combination with him.
"Q. There was no combination between your firm and Irwin, Green & Co?
"A. No, sir.
"Q. You and Rosenfeld and Irwin, Green & Co. were not acting together?
"A. No, sir.
"Q. To accumulate wheat here, were you?
"A. No, sir.
"Q. You never had any such orders from Wilshire, Eckert & Co. or Hoyt, did you?
"A. Never." (Rec. 275.)

Mr. Green says his firm had been acting for Mr. Hoyt for five or seven years—before he went to Cincinnati, and upon the subject of combination between the Chicago houses, he testifies as follows:

"Q. Was there any combination between you and C. J. Kershaw & Co., or between you and Rosenfeld & Co., or between you and anybody else?
"A. Not the slightest.
"Q. To force up the price of wheat in May and June, 1887?
"A. Not the slightest." (Rec., 279.)

Upon the 27th of May, Hoyt wrote a letter to Irwin, Green & Co., proposing that they should combine with Kershaw & Co. to take care of the wheat which both firms *had purchased*, but Irwin, Green & Co. refused to make any such arrangement, and declared they would have nothing to do with Mr. Kershaw or any one else. (Rec., 284–286.)

There was such absence of any concert of action between the Chicago brokers that when, in June, Hoyt ordered Kershaw & Co. to sell five million bushels, and they sold three millions and a half, Rosenfeld & Co. bought it all for Wilshire.

This was a blunder of Harper's in moving his chessmen. It is easy to see how these Chicago commission houses, acting in this way for their respective customers, might get loaded up with wheat before they had any idea that they were being used in an attempt to run a corner; and this was exactly what happened.

Irwin, Green & Co. purchased between 9,000,000 and 10,000,000 bushels for Mr. Hoyt, but they ceased buying upon the 20th of May, because "that was a sufficient quantity for one man." (Rec., 278.) From that time up to the 15th of June, they sold all that Mr. Hoyt would let them sell. They insisted on selling orders and got them, but Hoyt fixed a limit on price below which they could not go, so that they only succeeded in selling 2,750,000 bushels. (Rec., 278–279.) They had unwittingly got into a place where they could not dictate terms to Mr. Hoyt, but he could dictate terms to them.

And Mr. A. M. Wright, former president of the Board of Trade of Chicago, testifies as follows:

"I should presume the parties who were caught here, were in before they knew it, as they expected to get us in. I can con-

ceive how a house can get in where it can't help following the orders of the customer.

"Q. Explain a little more fully how that would naturally occur with commission men on the Board of Trade here?

"A. Well, parties in whom we had great confidence might load us up to an extent that would compel us to follow their dictation after we had taken on the load. If we had gone on and bought several million bushels, we will say, instead of buying three-quarters of a million, we would have been under their control then, and would have been obliged to do as they wanted.

"Q. In other words, self-protection would have compelled you to go further?

"A. Yes, sir; I think that any one who has the reptuation of having been engaged in that, would not have taken the deal if he had known beforehand what had been contemplated.

"Q. And it is your idea that the probabilities are that these purchases were commenced by these parties upon orders in like manner as orders were given you?

"A. I presume they were.

"Q. Without any arrangement or agreement, but in the way in which they were given you?

"A. They were careful not to intimate to us their purposes." (Rec., 296–297).

It is true there were rumors on the board of trade that there was to be a corner in wheat, and that the market was manipulated. But Eggleston says you never can determine when the market is being manipulated for the purpose of a corner. (Rec., 201.) Again he testifies as follows:

"Q. The wheat market in Chicago is always being manipulated more or less, is it not?

A. Yes, sir.

Q. Is it possible to say to-day, or at any time. whether or not a corner is being run on any product on the board of trade?

A. There can't anybody say that, except those who are interested, if they are trying to run a corner." (Rec., 212.)

Mr. Rosenfeld says it is impossible for commission men on the board of trade to tell how much wheat is being bought, and whether, when the price is advanced, it is being advanced speculatively or on its merits. (Rec., 238.)

Mr. Wright says: "The information that we have in "regard to transactions of that kind on the board is gen- "erally—the information is generally indirect, largely in- "ferential." (Rec., 288.)

But although some members of the board of trade thought the market looked like a corner, others thought wheat was not too high on its merits, and would go higher. (Rec., 206, 213, 237–8.) And, notwithstanding the rumors, Kershaw & Co. and Irwin Green & Co. must have felt that there was no attempt to corner the market, because such an attempt required combination, and they did not know of any combination. They did not know, as we now do, the extent of each other's purchases, nor that their purchases were controlled by, virtually, the same party. Kershaw says he did not know until a few days before the 15th of June, that Rosenfeld & Co. were buying for Wilshire, Eckert & Co. (Rec., 250, 276), and did not know Irwin, Green & Co. were buying for Hoyt until some time in June. (Rec., 276.) Mr. Green says he did not know that Kershaw & Co. were buying for Hoyt until about the 20th of May (Rec., 285,) and his firm bought no wheat after that time.

It did not appear to Irwin, Green & Co. as if Hoyt was connected with any attempt to corner the market, for they ceased buying for him on the 20th of May, and from that time on were sellers for his account, selling nearly three million bushels before the 15th of June. It did not appear to Kershaw & Co. that Hoyt was connected with any attempt to corner the market, for he had ordered them to sell all the wheat they had bought for his account, and they had sold four and one-half millions, which was nearly all he had. It did not appear to Kershaw & Co. that Hoyt and Wilshire were acting together,

for Wilshire bought, through Rosenfeld & Co., the very wheat which Kershaw & Co. sold for Hoyt; and while Hoyt was selling all his holdings, Wilshire was increasing his. This did not look like concert of action between Hoyt and Wilshire.

The Chicago brokers, Irwin, Green & Co. and C. J. Kershaw & Co. did not know until some time between the 20th of May and the 1st of June that the same principal (even then not known by name) had been using Hoyt and Wilshire to buy wheat through them in Chicago.

But at this time the purchases *were at an end.* Perhaps they had stopped because Irwin, Green & Co. said, "they had bought as much wheat as any one man ought "to have." Perhaps they had stopped because Harper had exhausted his resources in other ventures. It could have been shown, if it had been pertinent to this case, that the treasury of the Fidelity bank was not stripped by Harper's use of its funds in speculating in wheat, and that if the bank had possessed the assets it for years had been claiming to have, its doors would not have been closed upon the 22d of June.

This, however, is not to the point. The point we wish forcibly to call to the attention of the court is, that at the time when the Chicago commission houses learned the possibility of a conspiracy for the purpose of cornering the market in wheat, their purchases were a thing of the past. They had all been made. The burden was upon them to pay for the purchases if Hoyt and Wilshire, or their principal did not pay. There is no evidence that the Chicago commission houses made any purchases of wheat after this, and they cannot be charged with being engaged in carrying out an unlawful attempt to corner the

market, if they first acquired their knowledge that such an attempt was contemplated after all their purchases had been made.

Kershaw & Co. made efforts to get money from Wilshire, but this was for the purpose of discharging legal obligations which they had created in carrying out Wilshire's orders. Irwin, Green & Co. bought about one million bushels of wheat on the 15th of June, but this was done in an effort to stay the panic, and avert the large loss with which they were threatened upon the seven million bushels of wheat, which they were still carrying, because Hoyt had failed to fix a price low enough to enable them to sell it. These efforts of Kershaw & Co. and Irwin, Green & Co. to meet their liabilities, and save themselves from the consequences of the situation into which they had been innocently drawn, cannot be characterized as a criminal attempt upon their part to corner the wheat market.

Appellant's counsel seem to think it is entirely immaterial whether the Chicago commission houses had any knowledge, when they were purchasing the wheat, that it was being purchased in an attempt to run a corner, provided that they had such knowledge upon the 15th of June.

We think counsel is laboring under a misapprehension. The Chicago commission houses could not possibly be parties to an attempt to corner the market, unless they knew such an attempt was being made at the time when they were making their purchases. If they did not do anything to sustain that attempt, beyond paying for wheat already purchased after they learned that some one behind Wilshire and Hoyt was attempting to corner the market, then they were not privy to an attempt to

corner the market, for if they had innocently become indebted for the wheat they had purchased, they could innocently pay for the same, although they might by so doing be incidentally helping to carry out the illegal object which the principal had in view (but the broker did not) when the purchases were being made. The innocent parties had a right to protect themselves, and were not required to abandon their purchases and suffer themselves to be sued simply because the meeting of their legal obligations might help to carry out some illegal object to which they were not privies.

In the case of *Irwin* v. *Williar*, decided by this court and reported in 110 U. S., 499, the court says (p. 510:) "It is "certainly true that a broker might negotiate such a con- "tract without being privy to the illegal intent of the "principal parties to it which renders it void, and in such "a case, being innocent of any violation of law and not "suing to enforce an unlawful contract, has a meritorious "ground for the recovery of compensation for services "and advances."

There was no corner in wheat in June, 1887. As to that there can be no doubt. The only question there can be is, was there an *attempt* to corner wheat? If there was such an attempt, the only party cognizant of it was E. L. Harper. For the success of such an attempt the greatest secrecy is always necessary. For the success of such an attempt in this case, extraordinary secrecy was necessary, because of Harper's connection with a bank. The proof in this record shows that Harper's intentions were successfully kept secret from the Chicago commission houses.

If Harper had an intent to corner wheat in Chicago, it was abandoned upon the 14th of June when the panic

came. The only effort he then made was to protect past purchases. The Fidelity bank telegraphed that Wilshire would come to Chicago with six hundred thousand dollars to *save his trades* with Kershaw and others, not that he would come to make new purchases. Fair dealing and honesty required that purchases already made by the Chicago commission houses should be protected, and that those houses should be saved from ruin by the indebtedness, they had incurred on the orders of Harper's brokers.

We do not care, however, to be diverted by discussing the knowledge of the Chicago commission houses from the true question of fact we set out to discuss, namely, the knowledge of appellee itself. We have discussed the knowledge of the commission houses solely because appellant's counsel has charged that whatever the commission houses knew, appellee itself must have known because of its relations to those houses.

Appellant's counsel, however, charges that appellee knew when it took this paper upon the 15th of June, that the proceeds of the credit it gave Kershaw & Co. in reliance upon this paper, were to be used in an unlawful attempt to corner the market. And this question of fact we desire now briefly to consider.

It is argued that the large transactions of Kershaw & Co. with the American Exchange were sufficient to make known to that bank that Kershaw & Co. were engaged in an attempt to corner the market. On the contrary, the account showed that the purchases and sales of Kershaw & Co. were about equal, and while it did show that the transactions were very large, it had no tendency to show that Kershaw & Co. were "cornering" wheat. The books of the American Exchange show that the total amount which Kershaw & Co. had received from Wil-

shire, prior to the 15th of June, was only $340,000, as follows: April 28, $25,000; April 29, $25,000; April 30, $100,000; May 2, $100,000; June 13, $90,000. (Rec., 47, 49, 50.)

Wilshire gave Kershaw & Co. $400,000 upon the 15th of June. This makes $740,000 which the American Exchange knew Wilshire had furnished to Kershaw & Co. for the purpose of certain trades, and this is the extent of the knowledge of the appellee. Now, while this amount of money represented wheat enough to cause Kershaw & Co. and the American Exchange, as their bankers, some anxiety, it was not such an amount as would notify the American Exchange that Wilshire was engaged with Kershaw in an attempt to corner the market. One million bushels of wheat, which is all the $740,000 would have bought, would have had very little influence upon the market.

It is said that Eggleston, the largest stockholder in the American Exchange National Bank, was advancing Kershaw & Co., money to carry 8,000,000 bushels of cash wheat, and that he was daily in the bank in conversation with the cashier and other officers of the bank concerning it. Well, admitting this to be so, does it follow that the officers of the bank with whom Eggleston talked, knew that Wilshire was engaged with Kershaw in an attempt to corner the market? Mr. Eggleston says he did not go to the bank to "discuss the deal," but went because he was a large stockholder and was interested in the business of the bank, and had a sort of general knowledge of what was going on there. And in the course of discussing the loans of the bank to Kershaw & Co., in which firm Eggleston was a special partner, they discussed the amount which Eggleston himself was furnish-

ing Kershaw & Co., and the parties for whom the purchases of wheat were probably made. The name of Wilshire was not mentioned, nor that of any other Cincinnati party, but it was the Standard Oil Company and the "California crowd," "consisting of Mackay and two or three "others," that were mentioned, and Mr. Eggleston says: "I never in any conversation that I had with anybody— "in fact, I probably was surprised, as much surprised as "anybody else when the culmination of this deal came, to "find that it had been Mr. Harper that had manipulated "it. I never heard his name mentioned or breathed." (Rec., 207.) Mr. Eggleston and the bank were both interested in watching the account of Kershaw & Co., and this, manifestly, was the principal subject of these conversations.

It is said that the cashier was in constant communication with Kershaw and Hamilton Dewar with respect to their business during the progress of this transaction. This is a very general statement. Let us see definitely what the nature of the communication was. Being interrogated by defendant's counsel upon this matter the cashier himself testifies as follows:

"Q. Did you have any conversation with him (Kershaw), prior to the 14th, as to the quantity of wheat he was purchasing?

"A. I could not swear positively as to that; Mr. Kershaw would occasionally make some statements to me that he was going to take over so much cash wheat, and he wanted to be protected to that amount, or something of that sort.

"Q. Is it not a fact that Mr. Kershaw, prior to that time, and I mean for a few weeks prior to that time, repeatedly discussed with you the transactions he was engaged in and the contracts he was making?

"A. Not particularly so.

"Q. We may not construe that answer in the same way. Did he discuss the contracts he was making, the extent to which he was purchasing wheat, with you, prior to the 14th of June?

"A. To the best of my recollection, Mr. Kershaw, on several occasions mentioned some large amounts that he was to take care of from time to time; that is all I can remember about it.

"Q. Can't you state how large he stated the amounts were?

"A. No, sir; I cannot.

"Q. From time to time, you say, he did this. During what period?

"A. It must have been about, probably a couple of months.

"Q. You sent for Mr. Kershaw and your brother upon the receipt of this telegram from the Fidelity Bank upon the 14th of June?

"A. Yes, sir.

"Q. Did you have any conversation with them as to the character of the deal in wheat that they were engaged in on that occasion?

A. I do not remember entering into any particulars with reference to the deal at that time.

Q. Did you ask them to what extent they had been purchasing wheat?

A. I think not.

Q. Nor to what extent they had contracts outstanding for which they were liable to be called upon for money?

A. I don't remember any such conversation."

* * * * *

"Q. Your brother was one of the firm of Kershaw & Co., and was here?

A. Yes, sir.

Q. I don't know but what my questions have related, and you have understood them to relate, to conversations with Kershaw individually; had you any conversation with your brother as to the character of the transactions that they were engaged in?

A. I had conversations from time to time; yes, sir.

Q. What information did he give you as to the character of the deal that they were prosecuting in wheat, especially as to the quantity of wheat they were purchasing?

A. At times he would state how much they were purchasing, or about how much they were purchasing, but I had no reason to inquire into all their purchases with any definiteness, or their business.

Q. When their indebtedness to your bank approached the neighborhood of half a million of dollars you were concerned, were you not, in knowing about the character of the deal they were prosecuting?

A. Not the slightest, sir; it is simply this; Kershaw & Co.'s account was never for one moment overdrawn at this bank; I kept good track of that. They never had one cent of this bank's

money which was not amply secured; that's all I looked out for; all I cared about it." (Rec., 335-6-7.)

Mr. Kershaw's testimony is to the same effect. Being interrogated by defendant's counsel as to this matter he testifies as follows:

Q. "You had talked your business over from time to time with the officers of the bank, the condition of the account during those transactions, hadn't you?

A. Yes, sir.

Q. And what you were doing, and who you were doing it for?

A. Well, I think I told them when they asked me.

Q. Had you had any conversation with them as to who was the principal of Mr. Wilshire; I mean with Mr. Dewar, the cashier, or any of the people in the bank?

A. I don't know. They may have asked me. I told them I didn't know, probably. I don't know whether I did or not. They were looking at the margin checks more than anything else.

Q. Who was looking at margins?

A. The bank.

Q. Well, margins on what?

A. On the wheat we borrowed money on.

Q. You were borrowing money on wheat?

A. We were borrowing money on wheat.

Q. Of the American Exchange Bank?

A. Yes, sir; they generally take pretty good care to get good margins."

* * * * *

"Q. Aside from the indebtedness to the bank, for which they had collateral, your account was overdrawn on the 13th some $300,000 and upwards, wasn't it?

A. It was not overdrawn except they had good margins and good collateral.

Q. Are you sure they had collateral for your entire account on the 13th and 14th of June?

A. Yes, sir.

Q. What did it consist of?

A. Consisted of wheat being shipped, or shipped, or receipts

Q. Collateral for the whole amount of the indebtedness?

A. Yes, sir; I considered it in good condition." (Rec., 265 6-8-9.)

It is claimed by appellant's counsel that appellee must have known that Wilshire was engaged with Kershaw &

Co. in an unlawful attempt to corner the market, because Mr. Irwin, who was president of the bank, was also senior member of the firm of Irwin, Green & Co., who were acting as *brokers for Hoyt*. It seems to be impossible for appellant's counsel to look at these cases in the light of what was known to the parties at the time. They say that Irwin, Green & Co. were carrying wheat for the same parties as C. J. Kershaw & Co., and that Irwin, Green & Co. were buying wheat for Mr. Harper's broker. They forget that the record shows that Irwin, Green & Co. were buying wheat for Hoyt *alone*, and that they did not know who Mr. Hoyt's principal was, and simply had him upon their books as "B."

They were not buying wheat for Wilshire, and there is no evidence that they ever had anything to do with him.

There is no evidence that Mr. Irwin, personally, knew what his firm was doing for Mr. Hoyt. He went to the bank upon the 15th of June to get the $200,000, at the request of Mr. Green. Now, while the firm of Irwin, Green & Co. may be chargeable with the consequences of notice to either of the members of the firm, it certainly will not be claimed by defendant's counsel that appellee is chargeable with knowledge which Mr. Green possessed, because Mr. Irwin, his partner, was president of the bank.

Even, however, if Mr. Irwin knew what business his firm was doing for Hoyt, and that knowledge amounted to knowledge that an attempt was being made to corner the market, appellee would not be chargeable with the consequences of such knowledge in these cases, for the record shows positively, that Mr. Irwin was not an executive officer of the bank; that he did not act for the bank in the taking of the paper in suit, and that he had

no knowledge of the telegraphic correspondence between the two banks, which took place upon the 14th of June. (Rec., 409–416.)

Mr. Irwin says he did not act as president of the bank in determining whether the bank should receive this paper, and "was not asked anything about it," (Rec., 411), and further says, "I never had any business transaction "with Mr. Wilshire for myself, my firm or the bank, "never." (Rec. 412.)

The cashier, Mr. Dewar, testifies that there was no conference between him and Mr. Irwin, in reference to taking this paper. (Rec., 321.)

Appellant's counsel think it impossible to believe that the name of the Fidelity bank could be used as a means of covering up Harper behind Hoyt and Wilshire without exciting the suspicion of appellee. But it is more easy to believe this when we remember that Harper had for several years successfully deceived the able comptroller of the currency and bank examiners as to the true condition of the Fidelity bank, and had kept a honeycombed, rotten institution at the head of the long list of national banks in the state of Ohio.

V.

It is alleged in both of these cases that the court erred in finding that appellee was entitled to interest upon *twenty-five per cent.* of its claims from October 31, 1887, up to the date of such finding.

Appellee asked interest upon the face of its claims only up to the time when appellant was appointed receiver, June 27, 1887, although the dissolution of the bank was

not decreed until July 12, 1887. But appellant paid a dividend of twenty-five per cent. upon October 31, 1887, to all creditors whose claims had then been allowed, and appellee claimed that it should receive upon its claims a dividend of twenty-five per cent. as of that date. This prayer was granted, the court below stating orally that it was the object of the law to distribute the assets of the insolvent bank ratably amongst all its creditors, and that appellee could not be put upon an equality with the other creditors unless interest was allowed upon its dividend from the time that the other creditors received their dividends.

The decrees in these cases, therefore, allowed the claims with interest to June 27, 1887, the day when appellant was appointed receiver, but ordered appellant in paying the twenty-five per cent. dividend, which other creditors received October 31, 1887, to also pay appellee interest upon that dividend from October 31, 1887, to the time of the adjudication of the claim in the court below.

The learned counsel for appellant is entirely in error in thinking that this question was decided by this court in the case of *White* v. *Knox*, 111 U. S., 784. White recovered a judgment for $104,523.72, June 23, 1883, which included interest upon his claim up to that date. While White's claim was in litigation the receiver had paid ratable dividends to other creditors, amounting in the aggregate to sixty-five per cent. After White's claim was adjudicated the comptroller calculated the amount due him as of December 20, 1875, the date of the failure of the bank, and paid him sixty-five per cent. on that amount. White claimed that the dividend should be calculated on his claim, with interest on the whole claim up to the time of its adjudication. The court sustained the comptroller.

The case at bar presents an entirely different question; the court below has not allowed appellee interest upon its claims beyond the date of the failure of the bank. Interest upon the dividend, which it ought to have received October 31, 1887, at the same time when the other creditors received their dividends, is quite another thing. Appellee cannot be put upon an equality with the other creditors unless it is allowed the use of its dividend from October 31, 1887, inasmuch as the other creditors have had the use of their dividends from that date.

In deciding *White* v. *Knox*, Chief Justice WAITE was careful to point out that the question of interest upon dividends had not been raised. He says (page 787): "The question here is not whether he (White) should "be paid interest on the several items of percentage which "make up the aggregate of sixty-five per cent. from the "time of the payments of dividends to other creditors "until his claim was adjudicated, but whether the amount "of his judgment must be taken as the sum on which his "dividend is to be paid."

The question of interest upon dividends was not decided, therefore, in *White* v. *Knox*, and has not been passed upon by this court in any other case, nor by any court, so far as we are aware, except by the court below in these cases.

As we consider the facts of these cases of the first importance, we have set them forth with unusual, possibly unnecessary, fullness. The more fully, however, they are examined, the more clearly will it appear that appellee acted with integrity and good faith in all its relations to the matters here in controversy. This being so, appellee is entitled to be put in the same position it would have

been in if the Fidelity bank likewise had acted with integrity and good faith in relation to the same matters. This requires that the paper which appellee took as money should be honored in full, for there can be no doubt that if the Fidelity bank had acted with integrity and good faith, and had remained solvent, this paper would have been paid in full.

Respectfully submitted.

W. H. SWIFT,
Attorney for Appellee.

Counsel:
C. B. MATTHEWS.